Supreme Court, U.S.
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In The

Supreme Court of the United States

D. LYNN DUVALL,

Petitioner,

v.

MISSOURI DEPARTMENT OF SOCIAL SERVICES, MO HEALTHNET, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), the Supreme Court of the United States held that the provisions of 42 U.S.C. § 1396p(a)(1) – the "anti-lien statute" – only permit state Medicaid recovery programs to recover Medicaid benefits from the portion of a recipient's settlement of a personal injury claim that is for the medical costs paid as Medicaid benefits.

In this case Petitioner questions whether the recovery of Medicaid benefits from him as a trustee and a transferee of trust property held for the benefit of another individual who received Medicaid benefits prior to her death is permitted by the provisions of 42 U.S.C. § 1396p(b)(1) – the "anti-recovery statute." The only interest the Medicaid recipient ever had in the property was her equitable interest as the beneficiary of the trust during her lifetime and such property is not included within the individual's estate, as defined for purposes of the state's probate law.

The question presented is:

> May a state Medicaid recovery program recover benefits paid by obtaining and enforcing a judgment against a trustee or a transferee of trust property in which the Medicaid recipient never had any legal title or interest?

LIST OF PARTIES

The names of the parties and interested persons in the case for writ of certiorari to the Missouri Court of Appeals, Western District, re: WD70680, are:

1. MISSOURI DEPARTMENT OF SOCIAL SERVICES, MO HEALTHNET, writ Respondent [Respondent/Plaintiff for a petition under § 461.300 RSMo, the state agency for Missouri's Medicaid program seeking recovery of its claim against the probate estate of Mildred Ruth Duvall for Medicaid benefits paid for her during her life.]

2. D. LYNN DUVALL, writ Petitioner [Appellant/Defendant trustee and beneficiary of the M. Ruth Duvall Revocable Trust (Defendant's wife, Connie S. Duvall is a co-defendant in whose favor final summary judgment has been entered on Plaintiff's petition under § 461.300 RSMo; His son and daughter-in-law, Stephen and Angela Duvall, are dismissed co-defendants)]

3. MARTHA L. CREED, writ Respondent [Respondent/Defendant Public Administrator of Randolph County, Missouri, personal representative of the probate estate of said Medicaid recipient.]

LIST OF PARTIES – Continued

4. GLENDA L. WINKLER, writ Respondent [Interested person along with Martha L. Creed, who are the past and present Public Administrators of Randolph County, Missouri, and the original and/or successor guardian and conservator of Mildred Ruth Duvall (re: claims for fees payable to Randolph County, Missouri, for their services)].

5. SCOTT TEMPLETON, writ Respondent [Interested person (re: his claims against the estate of said Medicaid recipient for fees for services as attorney for Glenda L. Winkler and Martha L. Creed.)]

6. PHILLIP C. BROWN, writ Respondent [Interested person (re: his claims against the estate of the Medicaid recipient for fees for services as court-appointed attorney for said Medicaid recipient in the guardianship and conservatorship proceedings against her.)]

7. MARK TWAIN ASSISTED LIVING, INC., writ Respondent [Interested person/a privately owned Missouri corporation with only one known shareholder, Kathryn Miller, an individual (re: its claim against the estate of said Medicaid recipient for rent charged said Medicaid recipient)]

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Duvall, Estate of Mildred Ruth, Duvall v. Templeton, et al., Missouri Supreme Court, [SC90702 re: WD70109 consolidated with WD70238, WD70488 and WD70680; Cir. Ct. 06RA-PR00017 and 03PR176072] (transfer denied Mar. 23, 2010). No official citation to the Southwestern Reporter is known at the time of printing this petition. The judgment ordering the denial of Petitioner's application for transfer of the case to the Missouri Supreme Court is reproduced in the Appendix hereto at App. 43-44.

Duvall, Estate of Mildred Ruth, etc., Circuit Court of Randolph County, Missouri, 06RA-PR00017 [partial summary judgment on Count II, Petition under § 461.300 RSMo (entered Aug. 29, 2008); Order and Judgment to make the partial summary judgment as to liability final (filed February 13, 2009)] [is not

reported]. They are reproduced in the Appendix hereto at App. 34, 35-42.

BASIS FOR JURISDICTION IN THIS COURT

The decision of the Missouri Court of Appeals, Western District, to affirm the partial summary judgment [made final under Rule 74.01(b) of the Missouri Supreme Court Rules of Civil Procedure and appealed in WD70680], by Order pursuant to Rule 84.16(b) of the Missouri Supreme Court Rules of Civil Procedure, is final for purposes of 28 U.S.C. § 1257(a) – particularly under the third category of judgments held in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) to be "final" for jurisdiction to be conferred on the Supreme Court of the United States to review on a writ of certiorari the Order of the Missouri Court of Appeals, Western District, in question. The issue of Petitioner's liability is now res judicata [or "law of the case"] under state law and further review in the state courts as to the federal law question presented is precluded at the risk of sanctions. *Stamatiou v. Stamatiou*, 967 S.W.2d 229 (Mo. App. W.D. 1998).

By affirming the trial court's partial summary judgment the Missouri Court of Appeals, Western District, in WD70680:

a. has decided an important question of federal law – whether 42 U.S.C. § 1396p(b)(1) prohibits recovery of Medicaid benefits

from property in which the Medicaid recipient only had an equitable title or interest or from a non-probate beneficiary receiving a transfer of the legal title to such property – that has not been, but should be expressly settled by the Supreme Court of the United States; and

b. has decided this question of federal law in a way that conflicts with the relevant decision of the Supreme Court of the United States in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006) regarding 42 U.S.C. § 1396p(a)(1).

The questioned decision and Order of the Missouri Court of Appeals, Western District, was subject to discretionary review by the Missouri Supreme Court, the state court of last resort, by transfer pursuant to Rule 83.04 of the Missouri Supreme Court Rules of Civil Procedure. Petitioner first applied for transfer in the Missouri Court of Appeals, Western District, and then in the Missouri Supreme Court. Both applications for transfer were denied. This petition for review of the questioned decision and Order is timely filed within ninety (90) days of the date the Missouri Supreme Court denied Petitioner's Rule 83.04 application for transfer and review [in SC90702]. Rule 13.1, Rules of the Supreme Court of the United States.

Petitioner states in further compliance with Rule 14.1(e), Rules of the Supreme Court of the United States:

(i) December 8, 2009, is the date the Order by the Missouri Court of Appeals, Western District, sought to be reviewed was entered.

(ii) March 23, 2010, is the date the Missouri Supreme Court denied Petitioner's application for transfer of the case to it. No motion for rehearing was filed and there is no order respecting rehearing nor any order granting an extension of time to file this petition for a writ of certiorari.

(iii) There is no express reliance on Rule 12.5. This petition is not a cross-petition for a writ of certiorari.

(iv) 28 U.S.C. § 1257(a) is the statutory provision believed to confer on the Supreme Court of the United States jurisdiction to review on a writ of certiorari the Order of the Missouri Court of Appeals, Western District, in question.

(v) Rule 29.4(b) and (c) notification requirements do not apply.

STATUTES INVOLVED

42 U.S.C. § 1396p, subsection (b), paragraphs (1) and (1)(B), (4), (4)(A), and (4)(B):

> (b) Adjustment or recovery of medical assistance correctly paid under a State plan
>
> (1) No adjustment or recovery of medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:
>
> . . .
>
> (B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of –
>
> (i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or
>
> (ii) at the option of the State, any items or services under the State plan.
>
> . . .
>
> (4) For purposes of this subsection, the term "estate", with respect to a deceased individual –

> (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and
>
> (B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

§ 473.398 RSMo, subsections 1, 2, and 5 [L. 1977, H.B. No. 462, p. 632, §§ 1 to 4. Amended by L. 1981, S.B. No. 117, p. 621, § 1, eff. June 10, 1981; L. 1985, S.B. Nos. 5, 269, 270, 271, 276, 277 & 322, § A; L. 1995, S.B. No. 357, § A; L. 2007, S.B. No. 577, § A.]:

> 1. Upon the death of a person, who has been a participant of aid, assistance, care, services, or who has had money expended on his behalf by the department of health and senior services, department of social services, or the department of mental health, or by a county commission, the total amount paid to the decedent or expended upon his behalf after January 1, 1978, shall be a debt due the state or county, as the case may be, from the estate of the decedent. The debt shall be collected as provided by the probate code of Missouri, chapters 472, 473, 474 and 475, RSMo.

. . .

2. Procedures for the allowance of such claims shall be in accordance with this chapter, and such claims shall be allowed as a claim of the seventh class under subdivision (7) of section 473.397.

. . .

5. The provisions of this section shall not apply to any claims, adjustments or recoveries specifically prohibited by federal statutes or regulations duly promulgated thereunder. Further, the federal government shall receive from the amount recovered any portion to which it is entitled.

. . .

§ **472.010 RSMo**, paragraph (11) [L. 1955, p. 385, §2. Amended by L. 1957, p. 829, § 1, eff. June 12, 1957; L. 1978, H.B. No. 1634, p. 831, § A(§ 1), eff. Jan. 2, 1979; L. 1980, S.B. No. 637, p. 449, § 1, eff. Jan. 1, 1981; L. 1983, p. 852, S.B. Nos. 44 & 45, § 1; L. 1986, S.B. No. 787, § 1, eff. June 3, 1986.]:

When used in this code, unless otherwise apparent from the context:

. . .

(11) **"Estate"** means the real and personal property of the decedent or ward, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor, and diminished by any decreases and distributions therefrom.

. . .

§ **461.300 RSMo**, subsections 1, 2, 6, 8, 10(1), 10(3), and 10(4) [L. 1995, S.B. No. 116, § A. Amended by L. 2004, H.B. No. 1511, § A.]:

> 1. Each recipient of a recoverable transfer of a decedent's property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge the statutory allowances to the decedent's surviving spouse and dependent children, and claims remaining unpaid after application of the decedent's estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent's death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration.
>
> 2. The obligation of a recipient of a recoverable transfer may be enforced by an action for accounting commenced within eighteen months following the decedent's death by the decedent's personal representative or a qualified claimant, but no action for accounting under this section shall be commenced by any qualified claimant unless the personal representative has received a written demand therefor by a qualified claimant, within sixteen months following the decedent's death. If the personal representative fails to

commence an action within thirty days of the receipt of a written demand to do so, any qualified claimant may commence such action. If the personal representative fails to commence the action, the personal representative shall disclose to the qualified claimant or qualified claimants who made such written demand all material knowledge within the possession of the personal representative reasonably relating to the identity of any recipient of a recoverable transfer made by the decedent. In the event the personal representative fails to provide such information with respect to any recoverable transfer of the decedent's property to the personal representative, the eighteen-month limitation is tolled for such recoverable transfer until such time as the personal representative provides such information. In the event the personal representative is alleged in a verified pleading to be a recipient of a recoverable transfer from the decedent, the court may appoint an administrator ad litem to represent the estate in any proceeding brought pursuant to this section. Sums recovered in an action for accounting under this section shall be administered by the personal representative as part of the decedent's estate.

. . .

6. This section does not create a lien on any property that is the subject of a recoverable transfer, except as a lien may be perfected by the way of attachment, garnishment, or judgment in an accounting proceeding authorized by this section.

. . .

8. The recipient of any property held in trust that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, and the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, are subject to this section, but only to the extent of the decedent's contribution to the value of the property.

. . .

10. As used in this section, the following terms mean:

(1) **"Creditor"**, any person to whom the decedent is liable, which liability survives whether arising in contract, tort, or otherwise, and any person to whom the decedent's estate is liable for funeral expenses and the reasonable costs of a tombstone;

. . .

(3) **"Qualified claimant"**, a creditor, surviving spouse, dependent child, or a person acting for a dependent child of the dependent;

(4) **"Recoverable transfer"**, a nonprobate transfer of a decedent's property under sections 461.003 to 461.081 and any other transfer of a decedent's property other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death, but

only to the extent of the decedent's contribution to the value of such property.

STATEMENT OF THE CASE

The material facts in this case are undisputed, and most are alleged in the amended petition under § 461.300 RSMo filed against Petitioner [and other members of his family, but his son and daughter-in-law have been dismissed and summary judgment has been entered in favor of his wife] by the Missouri Department of Social Services for Missouri's Medicaid estate recovery program. They are stated as follows:

1. In 2002, Mildred Ruth Duvall ["Aunt Ruth"] used the services of Missouri elder law attorney Joseph Yungwirth, to ultimately qualify for nursing home Medicaid benefits in Missouri.

2. Pursuant to a plan presented by attorney Yungwirth to qualify her for Medicaid benefits, Aunt Ruth acted prior to June 28, 2002, to take her name off of bank accounts and financial funds that were jointly titled in both her name and Petitioner's name with rights of survivorship.

3. On June 28, 2002, Aunt Ruth:

a. was living in an assisted living facility owned and operated by Mark Twain Assisted Living, Inc., but was in need of living in a nursing home. [She later was

moved to Loma Linda, a nursing home in Moberly, Randolph County, Missouri.];

b. met with attorney Yungwirth at the assisted living facility with Petitioner present in the room;

c. signed a deed to make a present conveyance of her home property in Moberly, Randolph County, Missouri, to Petitioner, which deed was then recorded; and

d. signed a trust agreement prepared by attorney Yungwirth that identified her as the "Settlor" intending to create the M. Ruth Duvall Revocable Trust with the property listed in Exhibit A [which is blank] as the "trust estate."

4. On June 28, 2002, after Aunt Ruth signed said documents:

a. Petitioner signed said trust agreement prepared by attorney Yungwirth which identified Petitioner as the "Trustee" for said trust; and

b. Petitioner and his wife signed a deed as grantors to convey a 98% undivided interest in their home property directly to Petitioner as trustee of the M. Ruth Duvall Revocable Trust, which deed was then also recorded.

5. Aunt Ruth never had any legal title or interest in the home property of Petitioner and his wife described in the deed by them to Petitioner as said

trustee; and Aunt Ruth never put any asset into this trust.

6. Aunt Ruth was the recipient of Medicaid benefits subsequent to June 28, 2002.

7. Aunt Ruth died on April 26, 2005, while a ward and protectee as the result of proceedings commenced in 2003 in which the Public Administrator of Randolph County, Missouri, was appointed as guardian and conservator for her.

8. On the application of the Public Administrator of Randolph County, Missouri, letters were issued to the Public Administrator of Randolph County, Missouri, to administer Aunt Ruth's probate [decedent] estate as personal representative of that estate.

9. The only asset inventoried in the probate estate proceeding is a check for $648.00.

10. A claim was filed by the Missouri Department of Social Services [MO HEALTHNET] against the probate estate of Aunt Ruth that has been allowed [along with other contested claims filed by "creditors" – the interested persons identified in this petition for writ of certiorari]; but there are insufficient assets in the probate estate to pay such claim.

11. As the state Medicaid recovery program agency for Missouri, the Missouri Department of Social Services [MO HEALTHNET] demanded that the personal representative of Aunt Ruth's probate estate [the Randolph County Public Administrator] commence an accounting action under § 461.300

RSMo against Petitioner, his wife, and his son and daughter-in-law [to whom Aunt Ruth's prior home property was conveyed by Petitioner and his wife].

12. The personal representative did not commence such accounting action so the Missouri Department of Social Services [MO HEALTHNET] commenced such action [as count II of a petition joined with a discovery of assets count in the same pleading] alleging that the named defendants were beneficiaries of the M. Ruth Duvall Revocable Trust receiving a transfer of the trust's 98% legal interest in the home property of Petitioner and his wife.

13. Aunt Ruth was the beneficiary of the M. Ruth Duvall Revocable Trust during her life, which trust agreement contained language for the trustee to pay debts owed by her that could not be paid out of her probate estate.

14. Upon Aunt Ruth's death, Petitioner [erroneously referred to in the trust agreement as Aunt Ruth's "only child"] became the only beneficiary under the terms of the trust agreement.

15. After Petitioner's son and daughter-in-law were dismissed from the action, the remaining parties filed competing motions for partial summary judgment on the issues of Petitioner's and his wife's liabilities to account under § 461.300 RSMo on the amended petition of the Missouri Department of Social Services [MO HEALTHNET], the only party plaintiff.

16. Partial summary judgment was entered in favor of Petitioner's wife, but was entered against Petitioner as to the action for an accounting under § 461.300 RSMo.

17. The federal question presented in this case was raised and maintained by Petitioner in the trial court and the appellate courts as follows:

> a. The pleading by Missouri Department of Social Services [MO HEALTHNET] under § 461.300 RSMo against Petitioner, his wife, and his son and daughter-in-law [in Legal File for WD70680 at Vol. 1 of 9, pp. 17-39] alleges:
>
> > 1) in paragraph 16: "Under § 473.398 RSMo, DMS has the right to recover its public assistance expenditures from the above estate and DMS is interested in said estate as a creditor of the decedent. . . . ;"
> >
> > 2) in paragraph 23: " . . . DMS, as a creditor of the estate, has filed this action under authority of § 461.300, RSMo (Supp. 2004);"
> >
> > 3) in paragraph 24: "The property hereinafter described . . . is subject to being brought into the decedent's estate to the extent necessary to discharge the claim of DMS . . . :
> >
> > > a. all property currently owned by any Trust created by M. Ruth

Duvall Revocable Trust Agreement

b. All property transferred to beneficiaries of the M. Ruth Duvall Revocable Trust Agreement . . . ;"

4) in paragraph 28: "Under § 461.300, RSMo (Supp. 2004), Respondents D. Lynn Duvall, Connie S. Duvall, Stephen Duvall and Angela Duvall are liable to the estate for the value of the transfers received;"

5) Exhibit A to the amended petition is a copy of the quitclaim deed dated June 28, 2002 and signed by Ruth Duvall, grantor, to D. Lynn Duvall, grantee, and recorded July 23, 2002;

6) Exhibit C to the amended petition is a copy of the quitclaim deed dated June 28, 2002 and signed by D. Lynn Duvall and Connie S. Duvall, husband and wife, grantors to D. Lynn Duvall, Trustee . . . as grantee and recorded July 23, 2002;

7) Exhibit D to the amended petition is a copy of the M. Ruth Duvall Agreement and its Exhibit A listing no assets as the trust estate she transferred to the Trustee.

b. The Separate answer by D. Lynn Duvall – Petitioner herein – [in Legal File for WD70680 at Vol. 1 of 9, pp. 40-51]:

1) denies in paragraph 16 the averment that "Under § 473.398 RSMo, DMS has the right to recover its public assistance expenditures from the above estate and DMS is interested in said estate as a creditor of the decedent. . . . ;"

2) denies in paragraph 23 the averment that " . . . DMS, as a creditor of the estate, has filed this action under authority of § 461.300, RSMo (Supp. 2004);"

3) denies in paragraph 24 that "The property hereinafter described . . . is subject to being brought into the decedent's estate to the extent necessary to discharge the claim of DMS . . . :

a. all property currently owned by any Trust created by M. Ruth Duvall Revocable Trust Agreement

b. All property transferred to beneficiaries of the M. Ruth Duvall Revocable Trust Agreement . . . ;"

4) avers in paragraph 30: "The original and amended petition and each count thereof fail to state claims upon which relief may be granted . . . ;"

5) avers in paragraph 31: "§ 461.300 RSMo imposes no duty upon a personal representative to inventory any nonprobate transfer or trust property and does not make any property which is the subject of a nonprobate transfer or trust

agreement an asset of the decedent's probate estate . . . ;"

6) avers in paragraph 35: "Petitioner was not a creditor of Mildred Ruth Duvall, personally, before she died and its right to collect any State Debt is limited to collecting the alleged State Debt . . . under the probate code as an obligation of only the decedent's probate estate . . . ;"

7) avers in paragraph 36: "Petitioner does not have standing, legal capacity and authority to bring an action for accounting under § 461.300 RSMo;"

8. avers in paragraph 48: " . . . any averred trust created as to such property is not a trust in which any property of Mildred Ruth Duvall was contributed or held . . . ;"

c. The motion for partial summary judgment by D. Lynn Duvall – Petitioner herein – and his wife [in Legal File for WD70680 at Vol. 8 of 9, pp. 1390-1393] states as grounds:

"1. § 461.300 RSMo does not expand the definition of 'probate estate' for purposes of § 473.398 RSMo. Therefore, controlling Federal law does not permit Petitioner to recover its claim for Medicaid reimbursement from any Respondent or bring any trust or other non-probate property into the probate estate of the

> decedent Mildred Ruth Duvall to pay its said claim."

d. The legal memorandum with the motion for partial summary judgment by D. Lynn Duvall – Petitioner herein – and his wife [in Legal File for WD70680 at Vol. 8 of 9, pp. 1458-1476] argues the federal Medicaid anti-recovery statute, 42 U.S.C. § 1396p(b)(1):

> "The Medicaid Act, as amended by the Omnibus Budget Reconciliation Act of 1993 ('OBRA') expressly provides that **'[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made,' except in three specified circumstances.** 42 U.S.C. 1396p(b)(1) . . . "

e. The partial summary judgment entered by the Circuit Court of Randolph County, Probate Division (first entered on August 29, 2008 and made a Judgment filed February 13, 2009) [in Legal File for WD70680 at Vol. 9 of 9, pp. 1545-1551] determined the federal Medicaid anti-recovery statute, 42 U.S.C. § 1396p(b)(1) does not prohibit recovery of Medicaid benefits from D. Lynn Duvall [Petitioner] as trustee and as beneficiary of the M. Ruth Duvall Revocable Trust:

> " . . . Duvall argues that petitioner's claim is barred by the holding in, *In The Estate of Raymond V. Shuh*, 244 S.W.3rd 254. . . . *Shuh* dealt with a claim for spousal recovery. The court held that the

> definition of "estate" in the Missouri Probate Code was not broad enough under federal law to allow for a recovery against the estate of one whose spouse has received the Medicaid benefits. The facts in *Shuh* are inapposite to the facts in our case and the court does not believe it is controlling. . . . D. Lynn Duvall, as Trustee of the M. Ruth Duvall Revocable Trust Agreement, and as the beneficiary of said trust, shall be liable to account to the Personal Representative of this estate for a pro rata share of the value of the property received from said trust to the extent necessary to pay these claims . . . "

f. The federal question presented was preserved by presenting and arguing the two points relied on in Petitioner's Appellant Brief in WD70680:

> POINT RELIED ON I
>
> The trial court erred in granting summary judgment determining Appellant's liability as trustee and as the beneficiary of the M. Ruth Duvall Trust to account to the personal representative of the decedent's estate of Mildred Ruth Duvall under § 461.300 RSMo on the amended petition of Respondent State as a matter of law because it fails to state a claim upon which relief may be granted under applicable federal and state law in that the underlying claim of Respondent

State is for the State debt created by § 473.398 RSMo for the recovery of Medicaid benefits paid for Mildred Ruth Duvall during her lifetime and the petition exhibits show none of her property was contributed to said trust.

Shuh, Estate of, 248 S.W.3d 82 (Mo. App. E.D. 2008)

Bruce, Estate of, 260 S.W.3d 398 (Mo. App. W.D. 2008)

Cook v. Barnard, 100 S.W.3d 924, (Mo. App. W.D. 2008)

Buchanan v. Cabiness, 221 S.W.2d 849, 853 (Mo. App. W.D. 1949)

42 U.S.C. Section 1396p

§ 473.398 RSMo

§ 461.300 RSMo

POINT RELIED ON II

The trial court erred in granting summary judgment determining Appellant's liability under § 461.300 RSMo on the amended petition of Respondent State as a matter of law because there is no evidence, or at least no undisputed fact shown, that Mildred Ruth Duvall contributed any property or contributed to the value of any property ever put in the M. Ruth Duvall Revocable Trust that was subject to the satisfaction of her debts immediately prior to her death

> in that the only property conveyed, or attempted to be conveyed into the trust is the 98% interest in the home property of Appellant and his wife described in their deed to Appellant as Trustee of the M. Ruth Duvall Trust and there is no evidence, or undisputed fact, that Mildred Ruth Duvall contributed to its value.
>
> *Lamy, Estate of*, 679 S.W.2d 288, 290-291 (Mo. banc 1984)
>
> § 461.300 RSMo
>
> § 456.5-505 RSMo
>
> § 456.1-103 RSMo

g. The Missouri Court of Appeals, Western District, affirmed all the judgments appealed by Petitioner consolidated under WD70109, including WD70680, by its Order under Rule 84.16(b) of the Missouri Supreme Court Rules of Civil Procedure. It issued a written statement to the parties of its reasons for affirming the judgments. As to the partial summary judgment of Petitioner's liability to account and pay money to the personal representative in WD70680, it states at pp. 19-23 thereof:

> " . . . under section 473.398.1, a decedent who accepts Medicaid benefits owes a debt to the State for the total amount of those benefits that can be collected from her estate. *State v. Stogsdill (In re Estate of Macormic)*, 244 S.W.3d 254, 260

(Mo. App. S.D. 2008). If the estate is insufficient to pay the debt, the State is a creditor under 461.300.10(1) and is entitled to file an action for accounting under that statute. *Id. See also State v. Knight (In re Estate of Jones)*, 280 S.W.3d 647, 655 (Mo. App. W.D. 2009). . . . She transferred this property to Mr. Duvall, and at the same time, Mr. Duvall transferred a 98% interest in his home worth $350,000 to the trust . . . Mr. Duvall was a recipient of a recoverable transfer of decedent's property and is liable to account for a pro rata share of the value of all such property received . . . The probate court did not err in entering summary judgment. . . ."

h. In Petitioner's application for transfer to the Missouri Supreme Court, which was denied without any other ruling, Petitioner sought review of the federal question presented herein. He stated:

A. Grounds For Transfer.

. . .

c. May the State recover the decedent's Medicaid benefits as a personal liability of Appellant without a statutory redefinition of "probate estate"?

d. May relief be granted under § 461.300.8 RSMo to any creditor of the decedent since she contributed no property or value to property into the trust?

. . .

D. Pertinent Facts and Legal Discussion For Ground 1.c.

1. In WD70680, the State is the only "creditor" who filed or joined as petitioner in the action against Appellant [and others of his family] under § 461.300 RSMo claiming standing due to the State Debt for which it filed a claim against the $648.00 probate estate of the decedent.

2. The opinion in *Estate of Macormic, In Re*, 244 S.W.3d 254 (Mo. App. S.D. 2008) is interpreted and applied in this case as establishing the State's standing and right to recover Medicaid benefits paid by an accounting action pursuant to § 461.300 RSMo without the General Assembly acting to redefine "probate estate" in light of the general prohibition of such recovery by 42 U.S.C. Section 1396p(b)(1) – particularly since the law as established by *Cook v. Barnard*, 100 S.W.3d 924 (Mo. App. W.D. 2003) is that § 461.300 RSMo creates "a rule of liability, not of ownership."

3. It is an important question of law with general interest yet to be determined by the Supreme Court of Missouri whether the Court of Appeals is properly applying the governing federal and state statutes to allow the State to recover the State Debt for Medicaid from persons or trust estates and not from the recipient's

actual "probate estate" under Missouri law.

E. Pertinent Facts and Legal Discussion For Ground 1.d.

1. In WD70680, the State's petition [and the evidence] shows:

a. in June of 2002, the decedent signed as "Settlor" a trust agreement which contributed nothing to the "trust estate" thereunder [Exhibit A thereto lists no property declared by the terms of her trust agreement to constitute the trust estate thereunder, which trust agreement further reserved to the decedent the power to add assets to her "no asset" trust estate];

b. on the same date as the execution of the subject trust agreement, the decedent made an inter vivos conveyance of her Moberly house to Appellant alone; and

c. Appellant and his wife [in whose favor summary judgment has been entered in this case], owning their home property as tenants by the entirety, signed and delivered a deed of the 98% interest therein to Appellant as trustee under said trust agreement and never deeded the property to the decedent for her [rather than them as husband and wife] to fund this trust with their home property.

2. § 461.300.8 RSMo provides that recipients of property held in trust [not trustees so holding such property] "that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, . . . , are subject to this section, but only to the extent of the decedent's contribution to the value of the property" – and for purposes of § 456.5-505.1 RSMo, which governs whether the trust and its property were subject to the satisfaction of this decedent's debt's, § 456.1-103(23) provides that "each person is a settlor of the portion of the trust property attributable to that person's contribution . . . ".

3. It is a case of first impression and an important question of law with general interest that should be determined by the Supreme Court of Missouri whether [and to what extent] the decedent contributed to the value of the trust property to be received by Appellant as well as whether the decedent or Appellant and his wife, as tenants by the entirety, are the "settlor" as to the only property deeded to Appellant as trustee and/or as beneficiary under the subject trust agreement [which erroneously refers to him as the decedent's child].

ARGUMENT FOR ALLOWANCE OF THE WRIT

State courts, state legislatures, citizens facing or who may face Medicaid recovery actions in the various states, and attorneys advising them need a clear opinion from the Supreme Court of the United States binding on all state recovery programs determining the federal question presented in this case. The need is compelling and this case is "cert-worthy."

A. The importance of allowing the petition for a writ of certiorari in this case regarding the application of 42 U.S.C. § 1396p(b)(1), the "anti-recovery statute", to recovery from a deceased Medicaid recipient's estate is no less, and actually is greater, than the importance of allowing the petition for a writ of certiorari in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006) regarding 42 U.S.C. § 1396p(a)(1) – the "anti-lien statute" limiting Medicaid recoveries while the Medicaid recipient is alive. Not all Medicaid recipients will settle a personal injury case, but all Medicaid recipients will die and state efforts to recover Medicaid benefits will only increase.

States are under economic pressures to limit the pay-outs and increase the recovery of Medicaid benefits paid [even if correctly paid]. However, it is of paramount importance to our federal system and separation of powers in the federal and state governments, that:

1) federal and state legislative bodies be the departments of government that make the law determined to be necessary to deal with these pressures;

2) state legislative bodies recognize and act in accordance with preemptive federal law; and

3) state courts interpret and enforce the federal Medicaid laws and permissible state laws as enacted – and not aid state Medicaid recovery programs in unauthorized attempts to circumvent the Medicaid recovery prohibitions accepted by the States participating in the federal Medicaid program.

B. Focusing on state law rather than the express provisions of the federal Medicaid law [even though Missouri's Medicaid recovery statute § 473.398 RSMo by its own provisions does not allow recovery of the State Debt created by that statute if "prohibited by the applicable federal law"], the Missouri Court of Appeals, Western District, is allowing the Missouri Medicaid recovery program to get personal liability judgments against transferees of nonprobate property, without requiring the Missouri legislature to redefine "probate estate" or enact an expanded definition of the "individual's estate" for Medicaid recovery purposes to include any transferred property not constituting property of the recipient's probate estate. Further, in this case the Missouri Court of Appeals, Western District, has determined that **it is not even necessary that the Medicaid recipient have ever**

had any legal title or interest in the subject trust property to hold the trustee and recipient of a transfer of that property **personally liable for reimbursement of the Medicaid benefits** paid for the Medicaid recipient.

This case presents a question of federal law decided by the state courts of Missouri in a way that contradicts the ratio decidendi for the opinion of the Supreme Court of the United States in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006). The Missouri Supreme Court has not decided this question, and in fact continues to refuse to review it by denying applications for transfer in this and other Medicaid recovery cases brought under § 461.300 RSMo.

The answer to this question is important not only to Petitioner, but to all citizens and state governments. Unless settled by the Supreme Court of the United States in this case, Petitioner and many other citizens will be forced to reimburse states for Medicaid benefits paid for family members and perhaps others and/or expend valuable time and resources in responding to actions for the enforcement of judgments against them personally for recovery of Medicaid benefits paid to their loved ones.

C. Petitioner contends that such losses are prohibited by 42 U.S.C. § 1396p(b)(1), the "anti-recovery statute." But, such losses will occur – even if so prohibited – unless the decision of the Missouri Court

of Appeals, Western District, in this case is reviewed by the Supreme Court of the United States on a writ of certiorari.

Any exception to the prohibition of the anti-recovery statute involved in the present case would involve the application of the second exception as set forth in 42 U.S.C. § 1396p(b)(1)(B). In the exceptions, the statute focuses on the **"individual's estate."** Congress has determined that for the purposes of 42 U.S.C. § 1396p(b), the definition of a deceased recipient's estate shall include all real and personal property and other assets included within the individual's estate **as defined by the particular state's probate law**. 42 U.S.C. § 1396p(b)(4)(A).

Where the deceased recipient received or is entitled to receive benefits under a long-term insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii) of subsection (b)(1)(C) of the statute, the definition of the deceased recipient's estate shall also include:

> any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.
>
> 42 U.S.C. § 1396p(b)(4)(B).

At "the option of the State" this more expansive definition of estate **may apply** for all cases, not just those involving long-term care insurance policies. 42 U.S.C. § 1396p(b)(4)(B).

There is no pleading, evidence, nor contention by any party that the deceased Medicaid recipient in this case, Mildred Ruth Duvall, received or was entitled to receive benefits under a long-term insurance policy; and as stated in *Bruce, Estate of*, 260 S.W.3d 398 (Mo. App. W.D. 2008) at 406:

> . . . Missouri has not opted, as other states have, to take advantage of the authority afforded by Section 1396p(b)(4)B to define a Medicaid estate in such a manner as to capture traditionally non-probate assets. ***If the General Assembly wanted to empower Missouri's Medicaid program to recover non-probate assets, all it need do is redefine "estate" for purposes of Medicaid recovery, but it has not done so.*** [boldface added].

Notwithstanding this federal Medicaid law and the holdings in *Shuh, Estate of*, 248 S.W.3d 82 (Mo. App. W.D. 2008), and in *Bruce*, supra, involving application of the "anti-recovery statute" to prohibit recovery of Medicaid benefits from a surviving spouse's estate by making a probate claim for recovery under § 473.399 RSMo, the Missouri Court of Appeals, Western District, held in *Jones, In re Estate of*, 280 S.W.3d 647 (Mo. App. W.D. 2009), ***that no further action by the Missouri General Assembly to***

expand the definition of "estate" is required for a state department seeking recovery of paid Medicaid benefits from the Medicaid recipient's probate estate to proceed under § 461.300 RSMo to obtain a judgment against the beneficiary of a nonprobate transfer of real estate conveyed by the decedent by means of a beneficiary deed. It relied upon the pre-*Shuh* opinion of the Missouri Court of Appeals, Southern District, in the case of *Macormic, Estate of*, 244 S.W.3d 254 (Mo. App. S.D. 2008) which held that Missouri's agency for Medicaid recovery had standing to commence an action under § 461.300 RSMo as a creditor of a deceased recipient of Medicaid against a trustee or beneficiary of a trust ***funded by the decedent*** [although clarifying in footnote 14 of that opinion that it only dealt with the general issue of the State's standing and left the issue of whether there were in fact any assets in the estate for determination by the probate court based on the parties' pleadings (*Id.* at 260)].

The federal Medicaid law prohibition against recovery of paid Medicaid benefits from any property of a surviving spouse not shown to be property that transferred upon the death of the Medicaid recipient spouse as part of that spouse's probate estate under Missouri law was properly applied in *Shuh,* supra, and in *Bruce*, supra, and logically should apply to govern this case contrary to the decision of the Missouri Court of Appeals, Western District, disposing of appeal No. WD70680, – without even reaching the issue of who contributed the property to the trust.

[Petitioner stated in the legal memorandum in support of his and his wife's motion for summary judgment (in WD70680 at L.F. Vol. 8, L.F. 1457-1470) that he largely took the *Shuh* opinion and substituted the names and state statute in this case to restate that opinion as applicable to the pleadings and facts in this case]. Having been decided later in time, *Shuh*, supra, should have been held in *Jones*, supra, to have superseded and effectively overruled the prior inconsistent holding in *Macormic*, supra, but it did not so hold.

The Missouri state courts in all these cases have overlooked or ignored the fact that ***no personal liability*** of a recipient of a nonprobate transfer of property of the Medicaid recipient that could survive his or her death created by Missouri state law is allowed by the preemptive federal law. Rather, the federal Medicaid recovery statutes only allow liens and recovery from property of the deceased Medicaid recipient (much like liens for real estate taxes are collectable from the property but not as a personal liability of the owner, see *Buchanan v. Cabiness*, 221 S.W.2d 849, 853 (Mo. App. W.D. 1949).

Missouri law as determined by the Missouri Court of Appeals, Western District, in *Cook v. Barnard*, 100 S.W. 3d 924 (Mo. App. W.D. 2003), is that ***the value of property transferred by the decedent by nonprobate transfers*** for which the recipient of such transfer property may be held to account under § 461.300 RSMo ***is not thereby made part of the decedent's probate estate***. It only provides for the

handling of such personal liability judgment proceeds by the personal representative of the decedent's estate as a procedural means for the payment of "qualified claimants" from non-probate assets. Thus, a personal representative of a probate estate has no duty to file a petition under § 461.300 RSMo; and has no duty or right to inventory any nonprobate property that is the subject of a "recoverable transfer" under § 461.300. *Id.* at 926-927.

D. The legal issue of Petitioner's liability under § 461.300 RSMo for reimbursement of Medicaid benefits paid by Missouri to his deceased Aunt Ruth should be resolved by the Supreme Court of the United States settling the federal Medicaid law question presented in this case rather than by the decision and Order of the Missouri Court of Appeals, Western District, in this case, because:

> 1. The action by the Missouri Department of Social Services [MO HEALTHNET] under § 461.300 RSMo is based on Petitioner's status as the trustee of the M. Ruth Duvall Revocable Trust and a beneficiary receiving a transfer of the trust property he and his wife deeded to him as such trustee for the benefit of the now deceased Medicaid recipient, Mildred Ruth Duvall.
>
> 2. Petitioner's liability, and the extent of any such liability, under § 461.300 RSMo for reimbursement of Medicaid benefits paid by Missouri for his deceased Aunt Ruth depends upon proper interpretation, application, and enforcement of the provisions of 42 U.S.C.

§ 1396p, subsections (b)(1), (b)(1)(B), and (b)(4)(A) & (B).

3. The federal Medicaid law issue in this case needs to be resolved on a writ of certiorari pursuant to 28 U.S.C. § 1257(a) so that the provisions of 42 U.S.C. § 1396p, subsections (b)(1), (b)(1)(B), and (b)(4)(A) & (B) will be consistently ***and properly interpreted, applied, and enforced by state legislatures and courts nationwide***, including in times when states are facing tough budget constraints.

Even if the opinions in *Macormic,* supra, and *Jones,* supra, were not – or are not – in conflict with the federal Medicaid law, and even though it is possible the Missouri legislature might someday enact an expanded definition of the "individual's estate" for purposes of recovering Medicaid benefits paid on behalf of Medicaid recipients in Missouri, the decision of the Missouri Court of Appeals, Western District, to affirm the partial summary judgment finally determining Petitioner's liability to reimburse the state of Missouri for Medicaid benefits paid for Mildred Ruth Duvall should still be reviewed by the Supreme Court of the United States to settle the federal question presented, because:

1. The permissible, but optional expansion of the definition of the recipient's "estate" pursuant to the express provisions of the preemptive federal law ***should only extend to property once legally owned by the Medicaid recipient and transferred to the***

beneficiary of the non-probate arrangement by means of an instrument of transfer by such owner of his or her legal interest in that property. See 42 U.S.C. § 1396p(b)(4)(B) [No case exactly on point exists/or is found by Petitioner, but the federal statute is unambiguous].

2. The "recoverable transfers" subject to § 461.300 RSMo are statutorily defined to only include transfers of the "***decedent's property***" other than from the administration of his or her probate estate. See § 461.300.10(4) RSMo.

3. In this case Petitioner and his wife, rather than the deceased Medicaid recipient Mildred Ruth Duvall, are shown by the pleadings and the evidence [the alleged deeds and exhibits to the petition in the trial court (in WD70680 at L.F. Vol.1 of 9, pp. 26, 27, 28, 29, 39)], to be the persons who signed the deed to convey ***a 98% interest in the legal title to their home property to Petitioner as trustee*** of the M. Ruth Duvall Trust, which is the only property, if any, constituting the "trust estate" for the alleged trust. ***Petitioner is not the trustee or beneficiary receiving any property, if any, in the trust which the deceased Medicaid recipient Mildred Ruth Duvall ever had legal title or interest in or that was transferred by her deed***.

4. States, their citizens and attorneys advising and representing them still need to

know the limits of the states' authority to recover Medicaid benefits properly paid under federal Medicaid law as such limits apply to a Medicaid recipient's **equitable interests** in property.

5. Only the Supreme Court of the United States can settle this question to effect the uniform and proper interpretation, application, and enforcement of the "anti-recovery statute" in each and every state participating in the federal Medicaid program.

CONCLUSION

The Supreme Court of the United States has not expressly decided the federal question presented whether the "anti-recovery statute" prohibits recovery from property or transferees of nonprobate property in which the Medicaid recipient had only an equitable interest. The analogous federal question presented in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006) was settled in that case, but it left this equally important federal question unsettled.

The writ of certiorari sought in this case should be allowed for the Supreme Court of the United States to also settle this closely related federal question before Petitioner and other citizens have their moneys and properties taken by a state to recover Medicaid benefits paid on behalf of someone else (and, hopefully, for them to avoid even having to expend

their resources defending against such state actions as prohibited by the "anti-recovery statute" in the federal Medicaid law).

Respectfully submitted,

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D. Lynn Duvall

[SEAL]

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ESTATE OF MILDRED RUTH DUVALL, Deceased,	)	WD70109
D. LYNN DUVALL,	)	(Consolidated with WD70238, WD70488, WD70680)
Appellant,	)	Order Filed:
v.	)	December 8, 2009
SCOTT TEMPLETON,	)	
Respondent,	)	
PHILLIP C. BROWN,	)	
Respondent,	)	
STATE OF MISSOURI, DEPARTMENT OF SOCIAL SERVICES, DIVISION OF MEDICAL SERVICES,	)	
Respondent,	)	
GLENDA L. WINKLER, RANDOLPH COUNTY PUBLIC ADMINISTRATOR,	)	
Respondent,	)	
MARK TWAIN ASSISTED LIVING, INC., d/b/a MARK TWAIN OF MOBERLY,	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF RANDOLPH COUNTY, MISSOURI
The Honorable Gary G. Sprick, Judge
The Honorable Scott Alan Hayes, Judge

Before Special Division: Victor C. Howard, Presiding Judge, James E. Welsh, Judge and Mark D. Pfeiffer, Judge

ORDER

PER CURIAM:

D. Lynn Duvall appeals various orders and judgments of the probate division of the circuit court involving the conservatorship and decedent estates of Mildred Ruth Duvall.

The judgments are affirmed. Rule 84.16(b).

[SEAL]

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ESTATE OF MILDRED RUTH DUVALL, Deceased,	WD70109 (Consolidated with WD70238, WD70488, WD70680)
D. LYNN DUVALL, Appellant,	Filed: December 8, 2009
v.	
SCOTT TEMPLETON, Respondent,	
PHILLIP C. BROWN, Respondent,	
STATE OF MISSOURI, DEPARTMENT OF SOCIAL SERVICES, DIVISION OF MEDICAL SERVICES, Respondent,	
GLENDA L. WINKLER, RANDOLPH COUNTY PUBLIC ADMINISTRATOR, Respondent,	
MARK TWAIN ASSISTED LIVING, INC., d/b/a MARK TWAIN OF MOBERLY, Respondent.	

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

D. Lynn Duvall appeals various orders and judgments of the probate division of the circuit court ("probate court")[1] involving the conservatorship and decedent estates of Mildred Ruth Duvall ("Ruth").[2] The judgments are affirmed.

1

[1] "'[P]robate court' means the probate division of the circuit court." § 472.010(6), RSMo 2000.

[2] Mrs. Duvall will be referred to by her first name for purposes of clarity. No disrespect is intended.

Factual and Procedural Background

Mr. Duvall is the nephew of Ruth's deceased husband, Clyde Duvall, who died in 1994. He is self-employed as a real estate broker and insurance agent. As early as 1993, Ruth named Mr. Duvall as her attorney in fact under a general durable power of attorney. Ruth's bank accounts and mutual funds listed Mr. Duvall as a joint tenant. She owned a house in Randolph County valued at $57,000.

In the spring of 2002, Mr. Duvall contacted an attorney regarding qualifying Ruth for Medicaid. In June 2002, when Ruth was 89 years old, suffering from dementia, and residing at Mark Twain Residential Center, she signed a revocable trust agreement purporting to establish the M. Ruth Duvall Trust ("Trust"). The Trust named Ruth as the settlor and Mr. Duvall as the trustee and beneficiary after Ruth's death. Ruth transferred all of her property including her house and car to Mr. Duvall. Her mutual funds with a balance of nearly $178,000 and bank account with a balance of over $7000 were also placed in Mr. Duvall's name. At the same time, Mr. Duvall and his wife transferred a 98% interest in their house, valued at $350,000, to the Trust. Ruth eventually qualified for Medicaid. The State of Missouri, Department of Social Services ("Social Services") paid $75,818 in Medicaid benefits for Ruth during her lifetime.

In August 2004, the probate court declared Ruth to be totally incapacitated and legally disabled and appointed the public administrator of Randolph

County as the guardian of her person and conservator of her estate. Mr. Duvall appealed the probate court's judgment, and this court affirmed. *Mo. Dep't of Health & Senior Servs. v. Duvall (In re Duvall)*, 178 S.W.3d 617 (Mo. App. W.D. 2005) ("*Duvall I*"). Ruth died in April 2005 during the pendency of *Duvall I*. In April 2006, the conservator filed a petition for final settlement and petition for distribution. In response, Mr. Duvall filed an objection to the final settlement requesting the disqualification of Judge Scott Hayes. Judge Hayes denied Mr. Duvall's request to disqualify, and Mr. Duvall filed a petition for writ of prohibition, which this court summarily denied. The probate court approved the final settlement showing a balance of $648 in cash and decreed that said balance be distributed to Ruth's decedent estate. Mr. Duvall appealed the probate court's approval of the final settlement.

In March 2006, the probate court appointed the public administrator as personal representative of Ruth's decedent estate. Upon application of the public administrator, the probate court issued letters of administration in April 2006 to open Ruth's decedent estate. Mr. Duvall appealed the probate court's denial of his petition to revoke the letters of administration, and this court again affirmed the probate court's decision by order and memorandum opinion. *Estate of Duvall v. Duvall*, 222 S.W.3d 344 (Mo. App. W.D. 2007) ("*Duvall II*").

In March and April 2006, several claims were filed against the decedent estate. Phil Brown filed a

claim for legal services provided to Ruth as her court appointed attorney in connection with the conservatorship proceedings. Scott Templeton filed a claim for legal services provided to the conservator. The public administrator filed a claim for services rendered as guardian and conservator. Social Services filed a claim for reimbursement for Medicaid benefits paid to Ruth during her lifetime. Finally, Mark Twain Assisted Living Inc. filed a claim for personal care services provided to Ruth.

The claims were heard by the probate court in August 2008. The personal representative consented to the claims of all of the creditors. Mr. Duvall objected to the consent. The probate court allowed all of the claims. Specifically, it granted Mr. Brown's claim in the amount of $11,914.24, for legal fees and interest, Mr. Templeton's claim in the amount of $500, the public administrator's claim in the amount of $641, Social Services' claim in the amount of $75,888.18, and Mark Twain Assisted Living's claim in the amount of $6910. Mr. Duvall appealed.

In October 2006, Social Services filed a petition for accounting under section 461.300 and for discovery of assets under section 473.340 against Mr. Duvall individually and as trustee of the M. Ruth Duvall Revocable Trust Agreement. It alleged that the assets of the decedent estate were insufficient to pay its claim and sought to recover from the assets of the Trust. In March 2008, Social Services filed a motion for summary judgment on the accounting action alleging that the decedent's estate had insufficient

assets to pay creditors' claims, and Mr. Duvall should be required to account to the estate for Trust assets over which he had ownership and control. Mr. Duvall also filed a motion for summary judgment. Following a hearing on the motions, the probate court entered an interlocutory summary judgment in favor of Social Services finding that Mr. Duvall, as trustee and beneficiary of the Trust, shall be liable to account to the personal representative of Ruth's estate for a pro rata share of the value of the property received from the Trust to the extent necessary to pay the claims against and expenses of administration of the estate. By agreement of the parties, the probate court subsequently entered a judgment finding that that there was no just cause for delay and that summary judgment was final for purposes of appeal. (The discovery of assets action has not yet been resolved.) Mr. Duvall appealed. All of Mr. Duvall's appeals have been consolidated.

In his four appeals, Mr. Duvall raises thirteen points regarding the final settlement of the conservatorship estate, the allowance of the certain claims against the decedent estate, and the probate court's grant of summary judgment on Social Services' action for accounting.

Standard of Review

A court-tried probate case is reviewed under the standard set out in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). *Estate of Schooler v. Hemenway*, 204

S.W.3d 338, 342 (Mo. App. W.D. 2006). Thus, the probate court judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Id.*

Final Settlement of Conservatorship Estate

Three of Mr. Duvall's points on appeal involve the guardianship and conservatorship proceedings.[3] In the first point, Mr. Duvall claims that the probate court erred in overruling his application for change of judge. Specifically, he contends that Judge Hayes was disqualified and required to recuse himself from the proceedings to wind up administration of the conservatorship estate including adjudication of the final settlement because the judge was biased and prejudiced against him.

---

[3] On September 25, 2008, Mr. Duvall filed appellant's notice of post appeal order by trial court under section 472.190 RSMo and motion for determination of effect on appeal proceedings, which was taken with the case. The probate court entered an order on September 15, 2008, that no appeals from any judgments or orders made in the estate shall be taken until the entry of the decree of final settlement and distribution is made as provided by section 472.190. Mr. Duvall argued that the probate court's order staying his appeals prejudiced him. However, on February 13, 2009, the probate court set aside its September 15, 2008 order that no appeals be taken and determined that there was no just reason for delay and that its August 2008 summary judgment was final for purposes of appeal. Pursuant to that order, the September 15, 2008 order staying Mr. Duvall's appeals was, therefore, no longer effective.

Section 472.060[4] governs the disqualification of a judge in a probate court proceeding. It provides, in pertinent part:

> No judge of probate shall sit in a case in which he . . . is biased or prejudiced against any interested party . . . , when any party in interest objects in writing, verified by affidavit; and when the objections are made, the cause shall be transferred to another judge, in accordance with the rules of civil procedure relating to change of judge, who shall hear and determine same[.]

§ 472.060. The statute permits an automatic change of judge if the application includes a written objection, verified by affidavit, that the court is biased or prejudiced against one of the parties. *Estate of Johnson v. Kranitz*, 168 S.W.3d 84, 95 (Mo. App. W.D. 2005). It does not contain any specific time requirements for filing a motion to disqualify; however, a party may waive his right to disqualify under section 472.060 through delay in filing the motion. *Fenton v. Frein (In re Estate of Frein)*, 967 S.W.2d 258, 261 (Mo. App. E.D. 1998) (quoting *State ex rel. Nassau v. Kohn*, 731 S.W.2d 840, 842 (Mo. banc 1987)). A motion to disqualify is not untimely filed unless it is clear from the record that the trial or hearing of the matter has commenced or the cause ordered taken under submission by the court. *Id.* The Missouri Supreme Court

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[4] All statutory references are to RSMo 2000 unless otherwise indicated.

determined in *Nassau* that a deadline exists to prevent unnecessary burden upon judicial administration caused by unreasonable delay. *Id.*

This case began in 2003 with the filing of a petition for appointment of guardian and/or conservator for Ruth. Mr. Duvall filed objections to the petition and his own petition. Judge Hayes conducted an evidentiary hearing on the petitions in 2004 and, following the hearing, entered judgment finding Ruth to be totally incapacitated and legally disabled. The court also found that there was good cause shown not to appoint Mr. Duvall as Ruth's guardian and conservator of her estate and appointed the public administrator. Mr. Duvall appealed the probate court's judgment, and this court affirmed in *Duvall I*. Mr. Duvall did not file his motion to disqualify Judge Hayes until May 2006 after the hearing and judgment on the initial petition. The motion was untimely. *See Kranitz*, 168 S.W.3d at 96 (where motion to disqualify was not filed until after hearings and judgment ordering attorney to repay $20,000 partial compensation fee he previously received from estate, motion was untimely under section 475.060). *Cf. Frein*, 967 S.W.3d at 261 (where motion to disqualify was filed before any hearing or trial relating to the estate was held, motion was timely under section 472.060). The trial court did not err in denying Mr. Duvall's application for change of judge in the conservatorship proceedings. The point is denied.

In his next point, Mr. Duvall contends that the probate court erred in approving the final settlement

filed by the conservator. In approving the final settlement, the probate court found that "the decedent's probate estate is the appropriate forum to adjudicate the outstanding claims and otherwise administer decedent's financial affairs and as such said conservatorship estate is in a condition to be closed" and ordered the assets of the conservatorship estate be distributed to the decedent estate. Mr. Duvall asserts that administration of the conservatorship estate has not been properly wound up in that claims, costs, and expenses of that administration have not been fully adjudicated, paid, or otherwise disposed of as required by law.

Generally, the death of the ward or protectee terminates the conservator's authority and closes the conservatorship estate. § 475.083.1(5); *Summers v. Correll*, 853 S.W.2d 397, 400 (Mo. App. W.D. 1993). Section 475.083.3 provides, however, that "[n]otwithstanding the termination of the authority of a conservator, he shall continue to have such authority as may be necessary to wind up his administration." "[T]he wind up provision grants a conservator the authority to pay claims allowed by final judgment and to approve and pay the obligations incurred by the conservator in his or her administration of the estate." *Summers*, 853 S.W.2d at 401. Furthermore, whenever the protectee dies leaving debts other than funeral expenses, estate taxes, obligations of the conservator, or expenses of administration, as in this case, or whenever the protectee dies leaving a will,

then letters of testamentary or of administration shall be granted. § 475.320.2, RSMo 2000.

Ruth's death terminated the conservator's authority except as may have been necessary to wind up the administration of the conservatorship estate. While under the wind up provision of section 475.083.3, the conservator arguably had authority to pay claims allowed by final judgment and costs and expenses of the administration of the conservatorship estate, nothing in the probate code mandated that those issues be resolved in the conservatorship estate and not in the decedent estate. After Ruth's death, the probate court properly granted letters of administration opening her decedent estate pursuant to section 475.320.2. The probate court did not err in approving the final settlement of the conservator and ordering the assets of the conservatorship be distributed to the decedent estate for further administration of Ruth's financial affairs. The point is denied.

Mr. Duvall's next point asserts error by the probate court in not requiring notice be given to him of the conservator's final settlement. He contends that he is an "interested person" under section 472.010(15) entitled to such notice.

Section 472.100.1 provides that "[n]o notice to interested parties need be given except as specifically provided for in this code or as ordered by the court." Section 475.290.1 governs notice of final settlement of a conservatorship. It mandates written notice of final settlement be delivered to the protectee, or in

the case of death of the protectee, to her "executor or administrator or other person designated by the court." § 475.290.1. The probate code does not require notice of final settlement of conservatorship to be given to any other interested person. The probate court did not err in not requiring notice of the final settlement be given to Mr. Duvall. The point is denied.

Claims Against the Decedent Estate

Mr. Duvall's next eight points on appeal challenge the probate court's allowance of claims against the decedent estate. In two of the points, Mr. Duvall argues that the probate court erred in allowing Phillip Brown's and Scott Templeton's claims for legal services. Mr. Brown was Ruth's court appointed attorney in connection with the conservatorship proceedings. In those proceedings, Mr. Brown requested and the probate court approved legal fees in the amount of $8919. Specifically, the probate court entered an order in July 2004 authorizing Mr. Brown's claimed fees for services from August 21, 2003, through the hearing on the petition for the appointment of a guardian and conservator for Ruth on July 23, 2004. Additionally, it entered an order in June 2005, authorizing Mr. Brown's claimed fees for services from August 10, 2004, through June 16, 2005, covering his representation of Ruth through the appeal in *Duvall I*.

Mr. Templeton provided legal services to the public administrator in the conservatorship proceedings.

After the probate court issued letters of administration opening the decedent estate, Mr. Brown filed a claim in the decedent estate for his legal fees previously approved by the probate court in the conservatorship proceedings. Mr. Templeton also filed a claim for legal services in the amount of $500. The probate court approved both claims. Mr. Duvall does not challenge the amount of the attorney's fees. As near as can be determined, Mr. Duvall contends that Mr. Brown's fees may be authorized only through the date of the guardianship/conservatorship hearing and that both fees may be approved and paid only out of the conservatorship estate, not the decedent estate.

Section 475.075.3 provides that upon the filing of a petition for appointment of a guardian and conservator, the probate court shall immediately appoint an attorney to represent the respondent. The attorney shall "act with care to safeguard and advance the interests of the client." *Id.* A reasonable attorney's fee for the services rendered shall be allowed and taxed as costs of the proceeding. *Id.* Section 475.085.1 provides that the costs of proceedings as to incapacity or disability of any person ultimately found incapacitated or disabled shall be paid from her estate. Section 475.265 allows for compensation for necessary expenses in the administration of the conservator's trust including reasonable attorney's fees.

Mr. Brown's fees in this case either related to the preparation for the guardianship proceeding, appearing at the guardianship proceeding, or handling the related motions and appeal filed by Mr. Duvall

challenging the court's appointment of the public administrator as guardian and conservator. Mr. Brown's fees were related to the proceedings on capacity or disability and were allowable as costs of the proceedings under the probate code. Similarly, Mr. Templeton's fees for legal services to the conservator were allowable under the probate code.

Mr. Duvall argues that these fees may only be allowed against the conservatorship estate, not the decedent estate. As discussed above in the section involving the final settlement of the conservatorship estate, while the conservator had the authority under the wind up provision of section 475.083.3 to pay Mr. Brown's judgments and Mr. Templeton's fees for legal services provided to the conservator, nothing in the probate code prohibited the filing of those claims against the decedent estate after Ruth's death.

Section 473.370 provides that a person having a claim against a decedent estate may establish his claim by filing in the probate court the judgment or decree of a court of record. The probate court entered two orders in July 2004 and June 2005 allowing Mr. Brown's fees, and those orders had the effect of a judgment. *See* Section 475.205 ("An order allowing a claim has the effect of a judgment and bears interest at the legal rate. . . .") Mr. Brown then filed a copy of the judgments in the decedent estate establishing his claim against Ruth's decedent estate. The probate court did not err in allowing the claims. Furthermore, the probate court did not err in allowing Mr. Templeton's claim. The points are denied.

Mr. Duvall's next four points challenge the probate court's allowance of Social Services' claim under section 473.398, RSMo Cum. Supp. 2008, for reimbursement of Medicaid benefits paid to Ruth during her lifetime. He contends that Social Services failed to present competent and substantial evidence that the cost of collecting such claim did not exceed the amount of said claim. Additionally, he claims that Social Services failed to present competent and substantial evidence that medical assistance benefits had in fact been paid because the exhibits used to prove its claim were inadmissible, and even if they were admissible, they only show amounts allowed, not amounts of recoverable Medicaid benefits paid.

Social Services initially argues that Mr. Duvall lacks standing to appeal the allowance of its claim against the decedent estate. "'Whether a party has standing to appeal a judgment is a jurisdictional question that appellate courts must address.'" *Schieber v. Schieber*, 289 S.W.3d 256, 258 (Mo. App. W.D. 2009) (quoting *Estate of Sturmfels v. Frederick*, 261 S.W.3d 559, 562 (Mo. App. E.D. 2008)). The right to appeal from a probate court's order or judgment is purely statutory. *Id.* Section 472.160.1(1) authorizes an appeal from an order or judgment of the probate court allowing any claim against an estate exceeding one hundred dollars. However, to have standing to appeal an order of the probate court, the party must be an aggrieved "interested person." § 472.160.1. Section 472.010(15) defines "interested persons" as

> heirs, devisees, spouses, creditors or any others having a property right or claim against the estate of a decedent being administered and includes children of a protectee who may have a property right or claim against or an interest in the estate of a protectee. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.

"Statutes governing the right to appeal judgments of the probate court should be liberally construed, as the law favors the right to appeal." *Houston v. Zaner*, 683 S.W.2d 277, 282 (Mo. App. W.D. 1984).

Mr. Duvall is the devisee under Ruth's will. He, therefore, qualifies as an interested person under section 472.010(15) aggrieved by the allowance of Social Services' claim against Ruth's estate.[5] *See Miller v. Eigenheer* (*In re Estate of Weddle*), 84 S.W.3d 144, 147 (Mo. App. W.D. 2002); *Houston*, 683 S.W.2d at 282. Mr. Duvall has standing to appeal the allowance of Social Services' claim against the decedent estate.

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[5] Social Services argues that any judgment entered on its claim will not prejudicially affect Mr. Duvall if and until its petition for accounting is granted. As will be discussed below, the probate court properly granted summary judgment for Social Services on its petition for accounting holding Mr. Duvall liable to account to the personal representative of Ruth's estate for a pro rata share of the value of the property received from the Trust to the extent necessary to pay the claims against the estate.

Mr. Duvall first contends that Social Services failed to present competent and substantial evidence that the cost of collecting its claim did not exceed the amount of said claim. Federal law requires any state participating in the Medicaid program to establish a program to recover Medicaid benefits paid on behalf of an individual from the individual's estate. 42 U.S.C. § 1396p (Cum. Supp. 2009); *State v. Knight* (*In re Estate of Jones*), 280 S.W.3d 647, 650-51 (Mo. App. W.D. 2009). Section 473.398 authorizes the State to recover the value of Medicaid benefits paid from the estate of a deceased Medicaid recipient:

> Upon the death of a person, who has been a recipient of aid, assistance, care, services, or who has had moneys expended on his behalf by the department of health, department of social services, or the department of mental health, or by a county commission, the total amount paid to the decedent or expended upon his behalf after January 1, 1978, shall be a debt due the state or county, as the case may be, from the estate of the decedent. The debt shall be collected as provided by the probate code of Missouri, chapters 472, 473, 474 and 475, RSMo.

§ 473.398.1, RSMo Cum. Supp. 2008. Federal law also provides that a state may waive recovery in cases in which it is not cost effective to recover from an individual's estate. The Federal Health Care Financing Administration, State Medicaid Manual, § 3810 E. In its State Plan, Missouri has established standards and procedures to be used for waiving estate recoveries

when recovery is not cost effective. Mo. State Plan, § 4.17, Attach. 4.17-A-5. Subsection 3 of the section 473.398, RSMo Cum. Supp. 2009, provides:

> 3. Such claim shall not be filed or allowed if it is determined that:
>
> (1) The cost of collection will exceed the amount of the claim;
>
> (2) The collection of the claim will adversely affect the need of the surviving spouse or dependents of the decedent to reasonable care and support from the estate.

The State Plan provides that the estate's attorney or other interested person may raise a dispute regarding cost effectiveness of the State's claim with the State's attorney and that if the dispute cannot be resolved, the probate court will render a ruling in a scheduled probate hearing. Mo. State Plan, § 4.17, Attach. 4.17-A-6.

In this case, Mr. Duvall raised the bare allegation of cost effectiveness of Social Services' claim at the hearing on the claim in August 2008. Social Services' attorney asserted that "the policy of the State is not to file any claim that's less than $500 because it's been determined that anything less than $500 is not cost effective to pursue." Mr. Duvall did not challenge this assertion. The probate court was in a position to hear the arguments of counsel and evidence as a whole to determine whether the cost of collection exceeded the amount of the claim. It took judicial notice

of its files including the conservatorship estate case file and the decedent estate case file. *See Ayers v. Tracy* (*In re Estate of Ayers*), 984 S.W.2d 193, 196 (Mo. App. S.D. 1998) ("Courts may take judicial notice of their own records."). Such records showed Social Services' claim of almost $76,000. They also included an inventory and appraisement of the personal representative listing assets of $648 and unliquidated and unrealized assets of $407,000 to be recovered from Mr. Duvall and his wife under a discovery of assets and section 461.300 petition for accounting. Furthermore, the record included the revocable trust agreement. In allowing Social Services' $76,000 claim, the probate court made a common sense determination that the cost of collecting the claim did not exceed the amount of the claim. The point is denied.

In his next three points, Mr. Duvall contends that Social Services failed to present competent and substantial evidence that medical assistance benefits had in fact been paid because (1) the second page of Exhibit #1 is an inadmissible out of court statement of the custodian of the record that is necessary for the exhibit to be substantial evidence of paid public assistance, (2) Exhibit #2 contains an inadmissible self-serving conclusion of the custodian of the record that medical assistance benefits were paid and the amount of the services, and (3) Exhibits #1 and #2 only show amounts allowed not amounts of recoverable Medicaid benefits paid.

Section 473.398.4, RSMo Cum. Supp. 2008, authorizes the allowance of claims for Medicaid assistance

funds paid upon the showing of proof of moneys expended. Competent and substantial evidence of such payments include but are not limited to the following:

> (1) Computerized records maintained by any governmental entity as described in subsection 1 of this section of a request for payment for services rendered to the participant; and
>
> (2) The certified statement of the treasurer or his designee that payment was made.

§ 473.398.4, RSMo Cum. Supp. 2008.

Section 490.680 codifies the business records exception to the hearsay rule. It sets out three foundational requirement for admission of a business records: (1) the custodian or other qualified witness testifies to its identity and mode of its preparation, (2) the custodian or other qualified witness testifies that it was made in the regular course of business at or near the time of the act, condition, or event, and (3) in the opinion of the court, the sources of information, method and time of preparation justified its admission. *Id.*; *Mo. Dep't of Soc. Servs. v. Schlotter* (*In re Estate of Newman*), 58 S.W.3d 640, 646 (Mo. App. W.D. 2001). Business records consisting of computer printouts are admissible under the statute, provided the business regularly employs electronic computer equipment to enter and store information and the three foundational requirements are satisfied with respect to the entries reflected thereon. *Estate of Newman*, 58 S.W.3d at 646. Under section 490.692, business records are admissible without the

testimony of a custodian or other qualified individual if an affidavit is presented explaining that the records were kept as required by section 490.680. *Strong v. Am. Cyanamid Co.*, 261 S.W.3d 493, 519 (Mo. App. E.D. 2007).

To prove its claim against the estate, Social Services introduced Exhibits #1 and #2, its computerized records. Exhibit #1 consisted of an affidavit of a research analyst for Social Services and two pages of records — a reply from Social Services to a request for an "IM (Income Maintenance) Payment History Inquiry" on Ruth and a computer printout itemizing IM payments by date and amount. Exhibit #2 consisted of an affidavit of a custodian of records and a computer printout listing payments to medical providers for medications, physician, hospital, and nursing home care by date and amount. Both affidavits recited the foundational requirements enumerated in sections 490.680 and 490.692. Both affiants were employees of Social Services in divisions responsible for maintaining the business records involved. They testified that the records were kept in the ordinary course of business by an employee with knowledge of the act, event, condition, opinion, or diagnosis recorded and that the record was made at or near the time of the act, event, condition, opinion, or diagnosis. The exhibits were admissible under the business records exception.

Mr. Duvall contends that the second page of Exhibit #1 is an inadmissible out-of-court statement of the custodian of the record that is necessary for the

exhibit to be substantial evidence of paid public assistance. In the reply to the attorney general's request for payment history, the custodian notes the meaning of two acronyms for the type of assistance found on the printout. Although Mr. Duvall cites to two cases that stand for the general principle that the business records exception does not make admissible anything in the record that would have been inadmissible if offered in person, he fails to further develop his argument or cite authority relevant to the specific claim he makes here. This court cannot act as an advocate for a party. *Boyd v. Boyd*, 134 S.W.3d 820, 824 (Mo. App. W.D. 2004). Failure to develop an argument or cite to relevant authority results in abandonment of the point. *Houston v. Weisman*, 197 S.W.3d 204, 206 (Mo. App. E.D. 2006).

Mr. Duvall also claims that the probate court erred in admitting Exhibit #2 without striking the conclusion in the custodian's affidavit that "The records attached indicate that $74,018.93 was paid for Title XIX (Mo HealthNet Assistance) benefits on Mildred Duvall's behalf." He contends that the statement was a self-serving hearsay not admissible as part of the business records and that without the statement, the exhibit did not show recoverable amounts paid. However, as will be discussed next, even if the language challenged by Mr. Duvall were removed from the affidavit, the record was sufficient to establish payment of medical assistance benefits.

Finally, Mr. Duvall argues that, even if the exhibits were properly admitted, they did not provide

competent and substantial evidence that medical assistance benefits had been paid because they only show amounts allowed, not amounts actually paid. Contrary to Mr. Duvall's argument, Exhibit #1 lists individual checks by date and amount and the "Total Paid." Similarly, all of the entries in Exhibit #2 have a heading of "Paid Date" and then a heading of "Medicaid Paid/Allowed" with the amount listed. The exhibits provided competent and substantial evidence that medical assistance benefits had been paid on Ruth's behalf. The probate court did not err in allowing Social Services' claim. The points are denied.

In Mr. Duvall's next two points, he claims that the probate court erred in allowing the claim of Mark Twain Assisted Living ("Nursing Home") for personal care services provided to Ruth. On April 18, 2006, Kathryn Miller, on behalf of Nursing Home, signed and filed a claim against the decedent estate for $6910 for room, board, and personal care services provided to Ruth. The claim was originally noticed for hearing and heard on August 25, 2008. Although the personal representative consented to all of the pending claims at the hearing, the probate court dismissed Nursing Home's claim without prejudice finding that the claimant was a corporation but that the claim was filed by Ms. Miller who is not an attorney licensed to practice law in the State of Missouri. On September 22, 2008, attorney Randal J. Owings entered his appearance for Nursing Home and simultaneously filed a motion to modify or vacate the judgment dismissing Nursing Home's claim. The probate

court sustained the motion. Thereafter, Mr. Duvall filed his additional objections and motion to dismiss Nursing Home's claim. Following a hearing, Mr. Duvall's motion to dismiss was denied, and Nursing Home's claim was allowed.

On appeal, Mr. Duvall claims that the probate court erred in not dismissing and allowing Nursing Home's claim because it was not timely filed and the filing of the claim by Ms. Miller, a non-attorney, constituted the unauthorized practice of law.

Section 473.444 requires claims against an estate to be filed within one year of a decedent's death. Additionally, section 473.360.1 provides that a claim against an estate must be filed within six months of the publication of notice of letters of administration. Section 473.380 governs the form of a claim against an estate. It requires that a claim be "in writing, stating the nature and amount thereof, if ascertainable, and [be] signed by the claimant or by some person for him who has knowledge of the facts, stating that to the best of his knowledge and belief he has given credit to the estate for all payments and offsets to which it is entitled and that the balance claimed is justly due." § 473.380.1. "[A] claim filed in probate court is not judged by the strict rules of pleading." *Brethan v. Estate of Hedrick (In re Estate of Hedrick)*, 808 S.W.2d 30, 32 (Mo. App. E.D. 1991) (citing *Bench v. Egan's Estate*, 363 S.W.2d 547, 549 (Mo. 1963). "Accordingly, a claim is sufficient if it gives reasonable notice to the personal representative of the nature and extent of the claim and is sufficiently

specific that a judgment thereon will be res judicata of the obligation upon which the claim is based." *Id.* (citing *Bench*, 363 S.W.2d at 549). "Unless a claim is wholly insufficient, it may be amended after expiration of the statute of limitations for filing of claims." *Id.* (citing *Bench*, 363 S.W.2d at 549).

While a corporation generally cannot appear in a legal proceeding except through an attorney, *Stamatiou v. El Greco Studios, Inc.*, 935 S.W.2d 701, 702 (Mo. App. W.D. 1996), Mr. Duvall has not cited any cases holding that the filing of a claim against an estate by a corporation requires representation by a licensed attorney as a matter of law. Regardless, Ms. Miller filed the claim on behalf of Nursing Home on April 18, 2006, which was within one year of the date of Ruth's death, April 26, 2005. The claim was timely and sufficient to give to the personal representative reasonable notice of the nature and extent of the claim. Indeed, the personal representative consented to the claim. Mr. Owings then subsequently entered his appearance on behalf of Nursing Home. Because the claim was not wholly insufficient when originally filed, Mr. Owings's subsequent entry of appearance even after the expiration of the statute of limitations adequately amended the claim. The probate court did not err in not dismissing and allowing Nursing Home's claim. The points are denied.

Summary Judgment on Petition for Accounting

In his final two points, Mr. Duvall claims that the probate court erred in granting summary judgment in favor of Social Services on its petition for accounting under 461.300, RSMo Cum. Supp. 2008, and finding that he, as trustee and beneficiary of the Trust, shall be liable to account to the personal representative of Ruth's estate for a pro rata share of the value of the property received from the Trust to the extent necessary to pay the claims against and expenses of administration of the estate.[6] As can best be determined, he contends that no evidence was presented showing that Ruth contributed any property to the Trust or contributed the value of any property in the Trust

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[6] On March 9, 2009, Mr. Duvall filed a motion with this court, which was taken with the case, requesting the court to determine whether the summary judgment in favor of Social Services on its petition for accounting was final and appealable. Generally, a final, appealable judgment disposes of all claims and all parties in the case leaving nothing for future determination. *ARC Indus., Inc. v. Siegel-Roberts, Inc.*, 157 S.W.3d 344, 346 (Mo. App. E.D. 2005). However, under Rule 74.01(b), when more than one claim is presented or when multiple parties are involved, the trial court may enter a judgment as to fewer than all of the claims or parties and certify the judgment appealable upon an express determination that "there is no just reason for delay." *Id.* Although a trial court is given wide latitude in determining whether a partial judgment should be certified under the rule, where the circumstances of the case and the judgment entered are wholly inconsistent with a finding of "no just reason for delay," such finding is an abuse of discretion. *Id.* Here, the probate court did not abuse its discretion in certifying its summary judgment on the petition for accounting as appealable.

that was subject to the satisfaction of her debts immediately prior to her death.

Appellate review of the grant of summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. *Id.*

Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. *Id.* at 377. Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id.* at 376. For a claimant to establish a right to judgment as a matter of law, the claimant must show that there is no genuine dispute as to those material facts upon which the claimant would have the burden of persuasion at trial. *Id.* at 381. Once the movant has established a right to judgment as a matter of law, the non-movant must demonstrate that one or more of the material facts asserted by the movant as not in dispute is, in fact, genuinely disputed. *Id.*

Rule 74.04, which governs summary judgment procedures, requires the moving party to set forth a statement of uncontroverted material facts in separately numbered paragraphs. Rule 74.04(c)(1); *Gould v. Gould*, 280 S.W.3d 137, 142-43 (Mo. App. W.D.

2009). The party opposing summary judgment then "shall admit or deny each of movant's factual statements in numbered paragraphs that correspond to movant's numbered paragraphs." Rule 74.04(c)(2); *Gould*, 280 S.W.3d at 143. The non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate the existence of a genuine issue for trial. Rule 74.04(c)(2); *ITT*, 854 S.W.2d at 381. A response that does not comply with the rule "is an admission of the truth of that numbered paragraph." Rule 74.04(c)(2).

In this case, Mr. Duvall either admitted the fact statements in Social Services' motion for summary judgment or denied them without specific references to the discovery, exhibits, or affidavits to demonstrate the existence of a genuine issue for trial. Because Mr. Duvall failed to comply with Rule 74.04(c)(2), Social Services' factual statements are deemed admitted.

Section 461.300.1 provides that "[e]ach recipient of a recoverable transfer of a decedent's property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge . . . claims remaining unpaid after application of the decedent's estate."

A "recoverable transfer" is

> a nonprobate transfer of a decedent's property under sections 461.003 to 461.081 and any other transfer of a decedent's property other than from the administration of the

> decedent's estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death, but only to the extent of the decedent's contribution to the value of such property.

§ 461.300.10(4), RSMo Cum. Supp. 2008. Subsection 8 of section 461.300 specifically applies to property held in trust:

> The recipient of any property held in trust that is subject to the satisfaction of the decedent's debts immediately *prior* to the decedent's death . . . are subject to this section, but only to the extent of the decedent's contribution to the value of the property.

Section 456.5-505.1, RSMo Cum. Supp. 2008, provides, "Whether or not the terms of a trust contain a spendthrift provision, during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors."

As discussed above, under section 473.398.1, a decedent who accepts Medicaid benefits owes a debt to the State for the total amount of those benefits that can be collected from her estate. *State v. Stogsdill* (*In re Estate of Macormic*), 244 S.W.3d 254, 260 (Mo. App. S.D. 2008). If the estate is insufficient to pay the debt, the State is a creditor under section 461.300.10(1) and is entitled to file an action for accounting under that statute. *Id.* *See also State v. Knight* (*In re Estate of Jones*), 280 S.W.3d 647,655 (Mo. App. W.D. 2009).

The undisputed facts show that Social Services and other creditors have valid claims against decedent's estate equaling $88,943.42. The estate is insufficient to pay those claims – the inventory and appraisement listed only $648 in assets. Ruth owned property worth $340,344.42 – specifically, a house with a fair market value of $57,000, a car worth $8300, mutual funds valued at $177,976.20, a certificate of deposit valued at $7,068.22, and gifts made to Mr. Duvall of $90,000. She transferred this property to Mr. Duvall, and at the same time, Mr. Duvall transferred a 98% interest in his home worth $350,000 to the Trust. Mr. Duvall admitted Ruth transferred her assets to him in exchange for the interest in his house and that the purpose of the transfers was to qualify Ruth for Medicaid. The Trust was created by Ruth as settlor and funded by her with the 98% interest in the real estate. It was revocable, and the property held in it was subject to the satisfaction of Ruth's debts immediately prior to her death. Further, the Trust itself mandated that at Ruth's death, the trustee shall pay those debts that her estate is unable to pay. Specifically, Article IV of the Trust provides that "at the death of the Settlor, the Trustee shall pay the portion of Settlor's debts and charges that the Personal Representative or Administrator of Settlor's estate cannot pay from liquid assets, except the satisfaction of tort judgments."

Mr. Duvall was a recipient of a recoverable transfer of decedent's property and is liable to account for a pro rata share of the value of all such property

received to the extent necessary to pay the claims against and expenses of administration of the estate. The probate court did not err in entering summary judgment in favor of Social Services on its petition for accounting. The points are denied.

The judgments of the probate court are affirmed.

IN THE CIRCUIT COURT OF
RANDOLPH COUNTY, MISSOURI
PROBATE DIVISION

In The Estate of	)	Estate No.
MILDRED RUTH DUVALL,	)	06RA-PR00017
Deceased.	)	

ORDER AND JUDGMENT

(Filed Feb. 13, 2009)

On this 5th day of February, 2009, the cause comes on for hearing. Respondent D. Lynn Duvall's Second Motion to Modify is over-ruled and Respondent Duvall withdraws his Motion to Dismiss Count I of the Amended Petition. By Agreement of the parties, the Court makes the following findings, orders and judgments:

1. The Court's Order of September 15, 2008, that no appeals be taken is hereby set aside;

2. Supreme Court Rule 74 is ordered to apply to this proceeding;

3. With respect to the Court's Judgment of 29 August 2008, the Court finds and determines that there is no just cause for delay and said judgment is final for purposes of appeal.

/s/ Gary Sprick
Judge

IN THE CIRCUIT COURT OF
RANDOLPH COUNTY, MISSOURI
PROBATE DIVISION

In The Estate of MILDRED RUTH DUVALL, Deceased.	)	Estate No. 06RA-PR00017

State of Missouri, Department of Social Services, Division of Medical Services,

Petitioner,

vs.

D. Lynn Duvall, Individually, and as Trustee of the M. Ruth Duvall Revocable Trust Agreement, and as Trustee For the Family Trust,

and

Connie S. Duvall,

and

Glenda Winkler, Public Administrator as Personal Representative for the Estate of Mildred Ruth Duvall,

Respondents.

INTERLOCUTORY SUMMARY JUDGMENT ON COUNT II

On the 19th day of June, 2008, Petitioner State of Missouri, Department of Social Services, Division of Medical Services (hereinafter referred to as "Petitioner") appeared by its attorney Michael Kisling and presented its Motion for Summary Judgment on Count II of the Petition for Accounting. Respondents D. Lynn Duvall, individually, and as Trustee of the M. Ruth Duvall Revocable Trust Agreement and as Trustee for the Family Trust and Connie S. Duvall, (hereinafter Collectively referred to as "Duvall") appeared by their attorney Daniel Dunham and presented their Motion for Partial Summary Judgment relating to Count II of the Petition. Glenda Winkler, personal representative, appeared by attorney Scott Templeton and Phillip Brown appeared on his own behalf as a creditor of the Estate.

The facts of this care are extensively set forth in the parties respective statements of uncontroverted material facts and in their legal memorandums all of which have been considered by the Court. Mildred Duvall died on April 26, 2005 in Randolph County. A guardianship and conservator had been established for her in 2003. Glenda Winkler was appointed personal representative of this estate by this Court on March 24, 2006. The inventory and appraisement filed in her estate shows actual assets of $648.00. On June 28, 2002, M. Ruth Duvall, as Settlor, executed the M. Ruth Duvall Revocable Trust agreement, which appointed D. Lynn Duvall as the Trustee of the

Trust. Article IV of the trust agreement provides as follows: "At the death of Settlor, the Trustee shall pay the portion of Settlor's debts and charges that the Personal Representative or Administrator of Settler's estate cannot pay from the available liquid assets, except the satisfaction of tort Judgments." The trust provides that upon her death the assets are to be distributed to D. Lynn Duvall. Prior to her death, the decedent received Medicaid benefits from petitioner. Petitioner and other creditors had filed claims against the estate which totaled $95,060.39 and which were all pending on June 19, 2008 when these motions were presented to the court.

On August 25, 2008, all of the pending claims filed in this estate were heard by the court. On August 28, 2008, the court entered its Order and Judgment in which it allowed certain claims and disallowed others. The Court allowed petitioner's claim in the sum of $75,888.18; the claim of Phillip Brown in the sum of $11,914.24; the claim of Glenda Winkler in the sum of $641.00; and the claim of Scott Templeton in the sum of $500.00. Thus, the claims which have been allowed in the estate total $88,943.42.

Petitioner has filed an action for discovery of assets in Count I and for an accounting pursuant to the provisions of Section 461.300 in Count II. Both Petitioner and Duvall now ask the Court to enter Summary Judgment on their behalf on Count II.

Petitioner has a claim against the estate of Mildred Duvall for reimbursement of its medical expenses made on her behalf. The estate does not have sufficient assets with which to pay that claim. The Petitioner brings this action seeking to recover from the assets of the Mildred Duvall Trust. Section 461.300, RSMo, provides that persons who receive non probate transfers of a decedent's property which are subject to satisfaction of the decedent's debts immediately prior to decedent's death shall be liable for the payment of such debts to the extent of the value of the property received to the extent that such property was contributed to the non probate transfer by the decedent. Section 461.300.8 makes clear that this provision also applies to property held in trust which was subject to the satisfaction of decedent's debts immediately prior to death.

Section 456.5-505 RSMo provides that during the lifetime of a settlor the property of a revocable trust is subject to the claims of creditors. In addition, as indicated above, the M. Ruth Duvall Trust mandated that at her death the trustee pay those debts which her estate was unable to pay. Thus, the court finds from the statute and the terms of the trust that the assets of the M. Ruth Duvall Trust were available both before and after her death to pay creditors who could not be paid out of her probate estate.

Duvall argues that M. Ruth Duvall was not the settlor of her trust. This argument is disingenuous at best. It is not contested by anyone that she signed the M. Ruth Duvall Revocable Trust Agreement which

was dated June 28, 2002 and in which she is clearly designated as the "Settlor". On that same day, D. Lynn Duvall and Connie S. Duvall executed a deed transferring real estate to D. Lynn Duvall as trustee of the "M. Ruth Duvall Trust". At one point, Duvall makes the assertion that the decedent's husband, Clyde Duvall, who died in 1994, was the true grantor of this trust (Duvall Legal Memorandum, page 18). Despite Duvall's assertions, there is simply no credible evidence to show that M. Ruth Duvall was not the settler of this trust and that contention is rejected by the court.

Duvall next argues that Petitioner's claim under 461.300.1 fails because one must be a "recipient" of the property in order to have to account for decedent's unpaid debts and that nothing in the trust has been distributed to or received by them. Article VIII of the trust provides that upon the death of Settler [sic] the trustee "shall" distribute the trust to her living child (D. Lynn Duvall) and that the trust "shall" then terminate. Duvall's argument, apparently, is that so long as he does not "distribute" the trust to himself (in derogation of the mandate of the trust itself) that he is somehow not a "recipient" of the property. Again, this argument is disingenuous. It is uncontroverted that upon the death of Ruth Duvall, the entire beneficial interest in the trust has passed to D. Lynn Duvall. Acceptance of Duvall's argument on this point would allow one who is both the trustee and beneficiary of a trust to completely thwart the intent of Section 461.300 RSMo.

Finally, Duvall argues that petitioner's claim is barred by the holding in, In The Estate of: Raymond V. Shuh, 244 SW3rd 254, That case involved an attempt by the Department of Social Services to make a claim against the estate of decedent Raymond Shuh for Medicaid benefits paid on behalf of his wife Lucille Shuh who predeceased him by four years, and who had no estate opened for her. Thus, Shuh dealt with a claim for spousal recovery. The court held that the definition of "estate" in the Missouri Probate Code was not broad enough under federal law to allow for a recovery against the estate of one whose spouse had received the Medicaid benefits. The facts in Shuh are inapposite to the facts in our case and the court does not believe that it is controlling.

Petitioner relies upon In Re Estate of Macormic, 244 SW3rd 254 in support of its position. That case discusses Section 461.300 RSMo. It holds that a decedent who accepts medical benefits owes a debt to the State for those benefits which can be collected from his estate and that if the estate is insufficient to pay the debt that petitioner is a creditor under 461.300 RSMo and is entitled to file an action for accounting pursuant to that statute. The court believes that the holding in Macormic is on point with the facts of this case and establishes that petitioner and the other creditors have the right to pursue an action for an accounting under 461.300 RSMo to collect their debts from the assets of the M. Ruth Duvall Trust.

The court make [sic] the following findings, order, and judgments on Count II of the amended petition to-wit:

1) That Petitioner and the other creditors have valid claims against this estate which have been allowed by the court and that there are insufficient assets in the estate to pay said claims;

2) That D. Lynn Duvall, as Trustee of the M. Ruth Duvall Revocable Trust Agreement, and as the beneficiary of said trust, shall be liable to account to the Personal Representative of this estate for a pro rata share of the value of the property received from said trust to the extent necessary to pay these claims and for the costs of this proceeding and the costs and expenses of administration of this estate;

3) That Petitioner is granted an Interlocutory Partial Summary Judgment in accord with these findings against D. Lynn Duvall individually, and as Trustee of the M. Ruth Duvall Revocable Trust Agreement dated June 28, 2002 and as Trustee for the Family Trust;

4) That Petitioner's claim for Summary Judgment against Connie S. Duvall is denied; and

5) That the Motion for Partial Summary Judgment of Respondents D. Lynn Duvall, individually, and as Trustee of the M. Ruth Duvall Revocable Trust Agreement dated June 28, 2002 on Count II against Petitioner is denied; that the Motion for Partial Summary Judgment of Respondent Connie S. Duvall on Count II against petitioner is granted.

So Ordered:

Dated: 8-29-08.

/s/ Gary Sprick
Judge

STATE OF MISSOURI)
) S.S.
COUNTY OF RANDOLPH)

I, Probate Clerk of the Circuit Court in and for said County, hereby certify that the attached is a true copy of the original in the cause therein named, as the same appears on record in my office.

(SEAL) WITNESS my hand as Probate Clerk, and the seal of said Court, Done at my office in Randolph County this 2nd day of September 2008.

/s/ Kay Daniel Probate Clerk

In the Supreme Court of Missouri

SC90702
WD70109 consolidated with
WD70238, WD70488, and WD70680

January Session, 2010

Estate of Mildred Ruth Duvall, Deceased,

D. Lynn Duvall,

Appellant,

vs. (TRANSFER)

Scott Templeton, Phillip C. Brown,
State of Missouri, Department of Social Services,
Division of Medical Services, Glenda L. Winkler,
Randolph County Public Administrator,
Mark Twain Assisted Living, Inc., d/b/a
Mark Twain of Moberly,

Respondents.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI – Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January

Session, 2010, and on the 23rd day of March, 2010, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 23rd day of March, 2010.

/s/ Thomas F. Simon _____ Clerk

_____ D.C.

FORM NO. 15 COVER PAGE FOR APPLICATION FOR TRANSFER FILED IN THE SUPREME COURT OF MISSOURI

[USE ADDITIONAL PAGES IF NECESSARY. PAGES CONSTITUTING THE COVER PAGE SHALL NOT CONTAIN ANY INFORMATION NOT REQUIRED BY THIS FORM. BEGIN THE APPLICATION FOR TRANSFER ON A SEPARATE PAGE FOLLOWING THE COVER PAGE]

IN THE SUPREME COURT OF MISSOURI

DUPLICATE OF FILING ON
FEB 16 2010
IN OFFICE OF CLERK SUPREME COURT

In The Estate(s) Of Mildred Ruth Duvall, now deceased [protectee's and decedent's estates]

SCOTT TEMPLETON, PHILLIP C. BROWN, STATE OF MISSOURI DEPARTMENT OF SOCIAL SERVICES [MOHEALTHNET], GLENDA L. WINKLER and MARTHA L. CREED [Randolph County Public Administrators]

Plaintiffs)/Respondents,

vs.

D. LYNN DUVALL

Defendant & Interested Person/Appellant,

Circuit Court No 03PR176072 and 06RA-PR00017

Court of Appeals No. Consolidated: WD70109, WD70238, WD70488, and WD70680

Supreme Court No

Court of Appeals, Western District

Circuit Court for Randolph County

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion _____
or after opinion XX

(Check appropriate option)

[Please complete all of the following that are applicable:]

The date the record on appeal was filed[++]:

In WD70109	December 2, 2008
In WD70238	November 13, 3008
In WD70488	March 17, 2009
In WD70680	March 17, 2009

[++] all these appeals were later consolidated under WD70109 on May 22, 2009

The date the Court of Appeals opinion was filed:
(i.e. Rule 84.16 Order w/statement)
December 8, 2009

The date the motion for rehearing was filed
N/A [none filed]
and ruled on N/A

The date the application for transfer was filed
in the Court of Appeals December 22, 2009
and ruled on February 2, 2010

List every party involved in the case, indicate the position of the party in the circuit court (e.g. Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g. Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a

check mark in the space following to indicate each party applying for transfer.

Party		Attorney
D. LYNN DUVALL, Defendant [& IP] in trial court; Appellant in appellate court in WD70109, WD70238, WD70488, and WD70680	✓	Daniel Ray Dunham CARLYLE FOLEY, P.C. 804 Locust Street Columbia, MO 65201
STATE OF MISSOURI, DEPARTMENT OF SOCIAL SERVICES [MOHEALTHNET], Petitioner and Claimant in trial court; Respondent in appellate court in WD70109 and WD70680		Kathryn P. Taylor Assistant Attorney General 815 Olive Street P. O. Box 861 St. Louis, MO 63188-0861
MARTHA L. CREED**, Public Administrator of Randolph County/ Personal Representative of the Decedent's Estate of Mildred Ruth Duvall, [**preceded and succeeded GLENDA L. WINKLER in this office and as PR] Defendant in trial court WD70680; Respondent [IP] in appellate court in		Scott Templeton THE TEMPLETON LAW FIRM, P.C. Attorneys at Law 210 N. Elson, SuiteA P.O. Box K Kirksville, MO 63501

WD70109, WD70238,
WD70488, and WD70680

GLENDA L. WINKLER, former Public Administrator of Randolph County/conservator & PR of the protectee & decedent's estates of Mildred Ruth Duvall, in trial court; Respondent in appellate court in WD70238	SCOTT TEMPLETON THE TEMPLETON LAW FIRM, P.C. Attorneys at Law 210 N. Elson, SuiteA P.O. Box K Kirksville, MO 63501
SCOTT TEMPLETON THE TEMPLETON LAW FIRM, P.C. Attorneys at Law 210 N. Elson, SuiteA P.O. Box K Kirksville, MO 63501 claimant in trial court; Respondent [& IP] in appellate court In WD70109 and WD70680	[pro se claimant against estate]
PHILLIP C. BROWN Attorney At Law 211 North Williams Moberly, MO 65270, claimant in trial court; Respondent [& IP] in appellate court	[pro se claimant against estate]

In WD70109 and
WD70680

MARK TWAIN ASSISTED LIVING, INC., claimant in trial court; Respondent [& IP] in appellate court In WD70488 and WD70680	Randal J. Owings BRETT, ERDEL, CLAMPITT & OWINGS Attorneys at Law 100 N. Jefferson Mexico, MO 65265-2725

[END OF FORM NO. 15. COVER PAGE]

RULE 83.04 APPLICATION FOR TRANSFER
[WD70109, WD70238, WD70488, and WD70680 – Consolidated]

A. Grounds For Transfer.

1. The general interest in and importance of these questions of law:

a. Has the Court of Appeals properly applied Rule 84.16?

b. Is the partial summary judgment of Appellant's liability under § 461.300.8 RSMo final for appeal since it does not adjudicate other issues?

c. May the State recover the decedent's Medicaid benefits as a personal liability of Appellant without a statutory redefinition of "probate estate"?

d. May relief be granted under § 461.300.8 RSMo to any creditor of the decedent since she

contributed no property or value to property into the trust?

e. May the costs and expenses of administration of the protectee estate be allowed and handled as claims against the decedent's estate?

f. How is the Court to determine the cost to collect the State Debt does not exceed the State's claim against the assets of Decedent's probate estate?

g. Was filing the non-attorney signed claim of Mark Twain Assisted Living, Inc. in the probate court the unauthorized practice of law?

h. Was Appellant's filing of his disqualification of Judge Hayes as to proceedings for approval of the final settlement by the conservator too late?

i. Could the public administrator as personal representative bind Appellant, the sole devisee, to her own final settlement as conservator?

B. Pertinent Facts and Legal Discussion For Ground 1.a.

1. Judge Ellis recused as judge of the division hearing these consolidated appeals after oral argument – and the written statement attached to the Per Curiam Order is essentially an unpublished opinion of the court as a whole disposing of several issues as to which no precedent exists [e.g., above questions d, e, f, g, h, and/or i].

2. Rule 84.16 only authorizes disposition of these appeals by written order:

a. "where all judges agree to affirm and further believe that an opinion would have no precedential value"; and

b. "only when the appellate court unanimously determines" that certain specified circumstances exist that are dispositive of the matter for decision.

3. It is an important question of law with general interest given the prevalence of dispositions of appeals by written orders pursuant to Rule 84.16, whether such requirements [that must comport with the letter and intent of Article 5, § 12 of the Missouri Constitution] are met in this case – particularly as to whether "all judges" [rather than the "division" as the "court" pursuant to Art. 5, § 7 of Missouri Constitution] did and may agree or "unanimously determine" the dispositive circumstances [since one judge has recused], and that "an opinion" as to all issues decided would have no precedential value.

C. Pertinent Facts and Legal Discussion For Ground I.b.

1. The partial summary judgment appealed in WD70680 and affirmed:

a. disallows the claim of Mark Twain Assisted Living, Inc.;

b. does not adjudicate all costs, expenses, and other amounts which it declares Appellant is pro rata liable for;

c. does not determine whether the decedent's trust was actually funded, "the pro rata share" or "the value" of the property Appellant has or may receive from her trust; and

d. illogically holds that language in the trust agreement that after the decedent's death the trustee pay debts the personal representative cannot pay from her probate estate means it was subject to the claims of her creditors during her lifetime as the settler [sic] of the trust and enforceable in a venue different from where the trust, if it exists, is registered.

2. Appellant must be accorded the benefit of all reasonable inferences from the record on this appeal from a summary judgment, *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo banc 1993), and Rule 74 cannot be used to make appealable a partial summary judgment that does not dispose of all the issues for a distinct claim and judicial unit.

3. This is an important question of law with general interest determinative of appellate jurisdiction for WD70680 as to which a proper opinion with precedential value should be published by the Supreme Court of Missouri.

D. Pertinent Facts and Legal Discussion For Ground 1.c.

1. In WD70680, the State is the only "creditor" who filed or joined as petitioner in the action against Appellant [and others of his family] under § 461.300 RSMo claiming standing due to the State Debt for which it filed a claim against the $648.00 probate estate of the decedent.

2. The opinion in *Estate of Macormic, In Re*, 244 S.W.3d 254 (Mo.App.S.D. 2008) is interpreted and applied in this case as establishing the State's standing and right to recover Medicaid benefits paid by an accounting action pursuant to § 461.300 RSMo without the General Assembly acting to redefine "probate estate" in light of the general prohibition of such recovery by 42 U.S.C. Section 1396p(b)(1) – particularly since the law as established by *Cook v. Barnard*, 100 S.W.3d 924 (Mo.App.W.D. 2003) is that § 461.300 RSMo creates "a rule of liability, not of ownership".

3. It is an important question of law with general interest yet to be determined by the Supreme Court of Missouri whether the Court of Appeals is properly applying the governing federal and state statutes to allow the State to recover the State Debt for Medicaid from persons or trust estates and not from the recipient's actual "probate estate" under Missouri law.

E. Pertinent Facts and Legal Discussion For Ground 1.d.

1. In WD70680, the State's petition [and the evidence] shows:

a. in June of 2002, the decedent signed as "Settlor" a trust agreement which contributed nothing to the "trust estate" thereunder [Exhibit A thereto lists no property declared by the terms of her trust agreement to constitute the trust estate thereunder, which trust agreement further reserved to the decedent the power to add assets to her "no asset" trust estate];

b. on the same date as the execution of the subject trust agreement, the decedent made an inter vivos conveyance of her Moberly house to Appellant alone; and

c. Appellant and his wife [in whose favor summary judgment has been entered in this case], owning their home property as tenants by the entirety, signed and delivered a deed of the 98% interest therein to Appellant as trustee under said trust agreement and never deeded the property to the decedent for her [rather than them as husband and wife] to fund this trust with their home property.

2. § 461.300.8 RSMo provides that recipients of property held in trust [not trustees so holding such property] "that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, . . . , are subject to this section, but only to the extent of the decedent's contribution to the value of

the property" – and for purposes of § 456.5-505.1 RSMo, which governs whether the trust and its property were subject to the satisfaction of this decedent's debt's, § 456.1-103(23) provides that "each person is a settlor of the portion of the trust property attributable to that person's contribution . . . ".

3. It is a case of first impression and an important question of law with general interest that should be determined by the Supreme Court of Missouri whether [and to what extent] the decedent contributed to the value of the trust property to be received by Appellant as well as whether the decedent or Appellant and his wife, as tenants by the entirety, are the "settlor" as to the only property deeded to Appellant as trustee and/or as beneficiary under the subject trust agreement [which erroneously refers to him as the decedent's child].

F. Pertinent Facts and Legal Discussion For Ground 1.c.

1. In WD70109 and WD70238 the Court of Appeals affirms judgments allowing costs and expenses of administration of the decedent's protectee estate to be handled and allowed as claims payable under the probate code provisions for the payment of claims in and against the decedent's probate estate – rather than pursuant to the separate probate code provisions for the payment of claims in and against the protectee estate as part of winding up the

administration of the protectee estate in the conservatorship proceeding.

2. Such costs and expenses of administration of the protectee estate are not personal obligations or judgments against the decedent personally and the probate code does not included them as cost and expenses or claims against the decedent's estate, which the law recognizes as a separate estate and requires a separate "final settlement".

3. Whether such judgments should be affirmed presents a case of first impression and an important question of law with general interest that should be determined by the Supreme Court of Missouri.

G. Pertinent Facts and Legal Discussion For Ground 1.f.

1. In WD70109 the judgment affirmed [without any express determination as to the costs versus claim amount requirement for allowance of the State's claim under § 473.398 RSMo], allows the State claim for a State Debt for benefits paid the decedent over Appellant' objection that such allowance is not permitted in this case due to the provision of paragraph (1) of subsection 3 of § 473.398 RSMo – to which the State's attorney responded that such issue had never been raised and it was the State's policy to not file claims under $500.00 in any case as not cost effective [without reference to the size of the "probate estate" out of which such claim could be paid].

2. The proper interpretation and application of the provisions of paragraph (1) of subsection 3 of § 473.398 RSMo, particularly the legislative mandate that such claims not be allowed if it is determine [sic] that the cost of collection will exceed the amount of the claim, is a matter of first impression.

3. It is a case of first impression and an important question of law with general interest that should be determined by the Supreme Court of Missouri whether such judgment and allowance of the State's claim should be affirmed against the decedent's probate estate consisting of whatever balance of the decedent's Tax Refund of $648.00 remains [assuming such refund is ever received by the public administrator as conservator or personal representative] after the payments and final settlement mandated by §§ 475.085, 475.211, 475.213 and 475.290 RSMo are made.

H. Pertinent Facts and Legal Discussion For Ground 1.g.

1. In WD 70488, the claim of Mark Twain Assisted Living, Inc. was never signed nor filed by an attorney and had been disallowed on such ground [as stated in the partial summary judgment in WD70680], but was later allowed after all the time limits for claims being filed against the decedent's estate had passed when attorney Owing entered his appearance for this claimant [but did not sign the claim filed].

2. Appellant's brief cites cases establishing that representing and filing claims for corporations in other

types of proceedings is the practice of law rendering such filings nullities, but apparently no case has held whether this is the law regarding the filing of claims by a corporation in a decedent's estate proceeding.

3. It is a case of first impression and an important question of law with general interest that should be determined by the Supreme Court of Missouri whether such judgment and allowance of this corporation's claim against the decedent's estate not filed or signed by an attorney should be affirmed.

I. Pertinent Facts and Legal Discussion For Ground 1.h.

1. In WD70238 the judgment affirmed is Judge Hayes' approval of the conservator's "final settlement" after he assigned the proceedings therefore back to himself as presiding circuit judge upon the recusal of the new probate judge, all subsequent to his refusal to be disqualified by Appellant for further proceedings in the conservatorship [but having recognized such disqualification in the decedent's estate proceedings].

2. The right to disqualify a judge is fundamental to our system of justice and pursuant to § 472.060 RSMo is effective for all matters covered by a "timely" disqualification as held in *Estate of Frein*, 967 S.W.2d 258 (Mo.App.E.D. 1998); and a proper final settlement is required by § 475.290 RSMo.

3. Denial of Appellant's fundament right to disqualify Judge Hayes raises this important question of

law with general interest that should be finally determined by the Supreme Court of Missouri.

J. Pertinent Facts and Legal Discussion For Ground 1.i.

1. In WD70238 the judgment entered by Judge Hayes is affirmed as allowing the public administrator as personal representative of the decedent's estate to bind Appellant to her waivers and consent to Judge Hayes' approval of her purported final settlement as conservator without notice or opportunity to object and be heard being given to Appellant, the sole devisee of the decedent, with whom she has several conflicts [in both fiduciary capacities].

2. Paragraph (b) of subsection (2) 0f § 472.300 RSMo provides that the orders binding such fiduciaries bind an interested party like Appellant only "[t]o the extent there is no conflict of interest between them. . . .".

3. The judgment's denial of Appellant's right to notice as an interested person before the final settlement of public administrator as conservator of the protectee estate was approved raises this important question of law with general interest that should be finally determined by the Supreme Court of Missouri.

RESPECTFULLY SUBMITTED

/s/ Daniel Ray Dunham

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